MISSISSIPPI LAW JOURNAL

Legal Malpractice In Mississippi: Suits By Non-clients
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Parental Consortium: Assessing The Contours of The New Tort In Town
Johnny Parker

The Medical Expert Witness in Mississippi: Outgunning the Opposition

The Mississippi Limited Liability Company: A New Choice for Mississippi

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Agency—Vicarious Liability—Attorneys Incur Vicarious Liability for the Torts of Associated Counsel

VOLUME 64 FALL 1994 NUMBER 1

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The University of Mississippi began a four-year celebration of its sesquicentennial on February 24, 1994 and will continue the celebration through 1998. The goals of this celebration are threefold: Commemorate one hundred fifty years of leadership and service, plan the University of the 21st Century, and begin a capital campaign to attract funding to realize those goals. The School of Law is honored to have had a significant role in the University of Mississippi's one hundred fifty year history, and to play a part in the celebration in its Sesquicentennial.

In 1844, the Mississippi Legislature created the University of Mississippi by legislative act, and, in 1848 the University held its first classes in the School of Liberal Arts. Six years later, the Legislature created a department of law by an act entitled "An Act to Create in the University of Mississippi a Professorship of Governmental Science and Law"[1] which was designed to teach "philosophy of government and science of law."[2]

Thus, the School of Law is the next oldest division established at the University of Mississippi and is one of the oldest state-supported law schools in the United States. The University of Mississippi School of Law is proud of its important position in the history of the state and hopes to play an even greater role in the future.

As the University of Mississippi embarks upon its Sesquicentennial Celebration and Campaign, this issue of the *Mississippi Law Journal* is dedicated to the University's long history of leadership and service to the State of Mississippi.

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[1] 1854 Miss. Laws ch. 56.

[2] 1854 Miss. Laws ch. 56 § 1.

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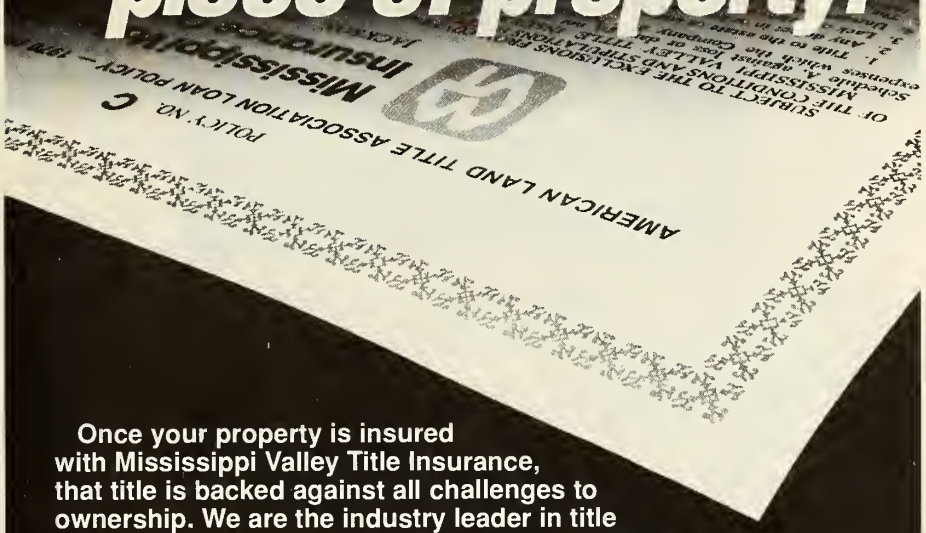

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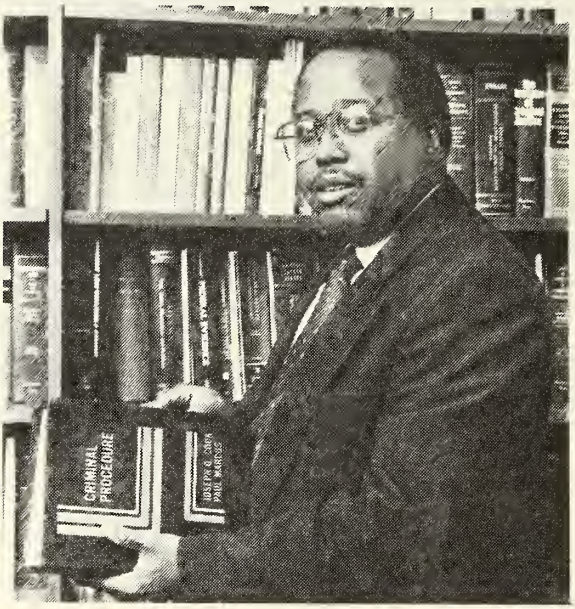
THE MISSISSIPPI LAW JOURNAL WELCOMES DEAN LOUIS WESTERFIELD



Kemper County native Louis Westerfield returned to his home state this summer to become the dean of the University of Mississippi School of Law.

Westerfield, 45, was named to the position following a national search and assumed his new post in July 1994. The two decades of legal experience Westerfield brings to the Dean's office are highlighted by his previous accomplishments as law school dean, law professor, state appeals judge, author and assistant district attorney.

Westerfield most recently served as dean of Loyola University's School of Law in New Orleans. At Ole Miss, he will work with twenty-five full-time faculty members and oversee a school that provides legal education to some 500 students each year. Westerfield will also supervise the Mississippi Law Research Institute, the Mississippi-Alabama Sea Grant Legal Program, the Mississippi Judicial College, the Mineral Resources Law Institute and Natural Resource Update law journal.

Shortly after his arrival at the University of Mississippi, Westerfield was honored with the establishment of the Louis Westerfield Award by the American Bar Association, Law Student Division, Fifth and Thirteenth Circuits. The award will be

presented annually to a member of the legal profession who promotes both diversity among faculty and students and improvements in the quality of legal education.

Westerfield holds a masters of laws degree from Columbia University Law School of New York and juris doctor degree from Loyola University. He graduated from Southern University in New Orleans with a bachelor's degree in political science in 1971, and he received an honorary doctorate degree in Humane Letters from Southern University in 1992.

Westerfield spent one year as an assistant district attorney in New Orleans before entering the field of legal education. He was named assistant professor of law and director of the Legal Clinic at Southern University School of Law in 1975. Two years later, Westerfield joined the Loyola law faculty. In 1983, Westerfield returned home to Mississippi where he accepted a position as professor of law at the University of Mississippi.

Westerfield's first experience leading a law school came in 1986, when he accepted as position as dean and professor of law at North Carolina Central University School of Law in Durham. Four years later, in 1990, Westerfield accepted a position as dean and professor of law at Loyola University. In 1994, Westerfield returned to the University of Mississippi as dean of the School of Law, director of the Law Center and professor of law.

Westerfield has authored a book and numerous law review articles. His book, *Louisiana Evidence*, was first published in 1986, and a revised version was published in 1992.

This summer, Westerfield broadened his legal experience when he served as judge pro-tempore of the Louisiana Second Circuit Court of Appeals for two months.

The Board and members of *Mississippi Law Journal* welcome Louis Westerfield to the University of Mississippi and anticipate a bright future for the School of Law under his leadership.

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LEGAL MALPRACTICE IN MISSISSIPPI: SUITS BY NON-CLIENTS

Timothy L. Hall[*]

Legal malpractice actions have traditionally stood upon three pillars: a malpractice plaintiff must prove (1) that the defendant attorney owed the plaintiff a duty of due care, typically arising out of an attorney-client relationship; (2) that the attorney breached this duty either by failing to fulfill contractual obligations owed to the plaintiff or by failing to live up to the applicable standard of care required of members of the legal profession; and (3) that the breach of duty was the proximate cause of injury to the plaintiff.[1] These elements reflect the traditional negligence issues of duty, breach and damages proximately caused by the breach.[2] But beneath the comfortable familiarity of these well-established elements, the law of legal malpractice is bulging at the seams, and perhaps nowhere more graphically than with respect to the most fundamental question: to whom does an attorney owe a duty of reasonable care?[3]

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[*] *Associate Professor of Law, University of Mississippi Law School. J.D., 1983, University of Texas.* *I have especially benefited in writing this article from discussions with my colleagues Bryn Vaaler and Gary Myers and from their comments on an earlier draft of this article.*

[1] *See* Hickox v. Holleman, 502 So. 2d 626, 633-34 (Miss. 1987) (discussing elements plaintiff must prove in legal malpractice case); Hutchinson v. Smith, 417 So. 2d 926, 927-28 (Miss. 1982) (stating that plaintiff in legal malpractice case must prove existence of relationship, acts of negligence and proximate cause).

[2] *See* Burnham v. Tabb, 508 So. 2d 1072, 1074 (Miss. 1987) (citing as elements of negligence claim, proof of (1) "[t]he existence of a duty . . . to conform to specific standard of conduct for the protection of others against an unreasonable risk of injury"; (2) breach of that duty; (3) causal relationship between breach of duty and any alleged injury; and (4) injury or damages); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984) (describing basic elements of negligence claim).

[3] *See* Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359, 368

Traditionally, legal malpractice plaintiffs came in only one variety: clients readily identified as such. In fact, the existence of an attorney-client relationship has often been asserted to be a necessary element of a malpractice claim.[4] Courts with little hesitation have reasoned that the only duties owed by lawyers in a malpractice suit are those running to clients.[5] In most legal malpractice actions, proof of the requisite relationship between a malpractice plaintiff and the target lawyer is a straightforward matter. But sometimes a successful malpractice claim requires either that a plaintiff win the label of client under disputed circumstances or else persuade a court to dispense with the traditional requirement of proving the existence of an attorney-client relationship.[6] I have examined

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(Miss. 1992) ("It is basic tort law that before one can be found negligent he must owe a duty to the injured party."). Duty, according to Professors Prosser and Keeton, "is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk." KEETON ET AL., *supra* note 2, § 53, at 356.

[4] *See, e.g., Hickox*, 502 So. 2d at 633; *Hutchinson*, 417 So. 2d at 927.

[5] There are, of course, other duties owed by lawyers to third parties the breach of which will support liability. For example, lawyers who deal fraudulently with non-clients—even opposing parties in litigation—may be held accountable. *See, e.g.,* Slotkin v. Citizens Casualty Co., 614 F.2d 301, 314-17 (2d Cir. 1979) (holding counsel for hospital liable for statements made in course of settlement negotiations because counsel incorrectly asserted that hospital had only $200,000 in insurance coverage when in fact hospital had two policies, one for $200,000 and another for $1,000,000), *cert. denied*, 449 U.S. 981 (1980). Lawyers may also commit unfair debt collection practices toward third parties that will sustain liability findings. For cases finding lawyers liable to third parties under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1601-1693r (1988 & Supp. 1994), see Jenkins v. Heintz, 25 F.3d 536, 540 (7th Cir.), *cert. granted*, 63 U.S.L.W. 3161 (U.S. Oct. 31, 1994) (No. 94-367); Fox v. Citicorp Credit Serv., Inc., 15 F.3d 1507, 1513 (9th Cir. 1994); Scott v. Jones, 964 F.2d 314, 317-18 (4th Cir. 1992). *But see* Green v. Hocking, 9 F.3d 18, 20-21 (6th Cir. 1993) (holding that Act did not apply to attorneys engaged solely in law practice). For discussions of emerging theories of attorney liability to non-clients, see J. Randolf Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803 (1994); Stephen Gillers, *Ethics that Bite: Lawyers' Liability to Third Parties*, LITIGATION, Winter, 1987, at 8.

[6] Occasionally a dispute will arise as to whether a client represented in other matters was being represented in connection with the matter made a subject of a malpractice action. In general, courts have required proof that an attorney-client

elsewhere the potential malpractice liability lawyers face from "camouflaged clients"—that is, parties who earn the title of client even though they never paid a legal bill or had their names affixed to a legal file folder.[7] In this Article I examine the potential for malpractice liability to parties other than clients.

One of the major trends in attorney liability over recent years has been the increase in malpractice and related suits brought against attorneys by non-clients. Most jurisdictions continue to require proof of an attorney-client relationship as a necessary element of a legal malpractice claim,[8] but exceptions to this rule are steadily proliferating.[9] Attorneys, once secure from non-client malpractice claims by the long-standing requirement of proof of an attorney-client relationship, suddenly find themselves being sued by unlikely plaintiffs.[10]

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relationship existed with respect to "the act or omission upon which the malpractice claim is based." Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977); *see also* Brandlin v. Belcher, 134 Cal. Rptr. 1, 3 (Cal. Ct. App. 1977) (requiring that attorney-client relationship at least exist with respect to certain transactions when no formal agreement exists to establish relationship); Henzel v. Fink, 340 So. 2d 1262, 1264 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 948 (Fla. 1977); Shropshire v. Freeman, 510 S.W.2d 405, 406 (Tex. Civ. App. 1974); Hansen v. Wightman, 538 P.2d 1238, 1245 (Wash. Ct. App. 1975).

[7] *See* Timothy L. Hall, *Legal Malpractice and the Camouflaged Client*, 35 LAW OFF. ECON. & MANAG. 189 (1994); *see also* Nancy J. Moore, *Expanding the Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659 (1994) (discussing recent expansion in definition of "client").

[8] For the general requirement of an attorney-client relationship, see Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties—At What Cost?*, 23 COLUM. J.L. & SOC. 1, 5 (1989); Ronald I. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209, 209-10 (1986) (discussing contexts in which attorney-client relationship exists).

[9] *See* Flaherty v. Weinberg, 492 A.2d 618, 625-27 (Md. 1985) (noting that Maryland allowed exception for third party beneficiary in regard to rule of strict privity in legal malpractice cases). For the suggestion that "most states will come to reject privity as an absolute requirement," see W. Probert & R. Hendricks, *Lawyers Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708, 708 (1980). For a survey of the trend towards expanding liability, see Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client*, 61 A.L.R.4TH 464 (1988); Joan Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4TH 615 (1988).

[10] For one of many examples, consider the attorney who allegedly failed to file

Most of these claims continue to be losers,[11] but the odds in favor of non-clients are constantly increasing.[12]

For most of this century, lawyers were beneficiaries of longstanding notions of privity that generally acted to limit tort liability to claims brought by the immediate parties to an underlying transaction.[13] As early as 1879, the United States Supreme Court had erected the citadel of privity squarely across the road to malpractice liability, and non-clients dashed against its flinty walls in vain. In *Savings Bank v. Ward*,[14]

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a divorce decree before a husband died and suddenly found himself sued, though ultimately without success, by children aggrieved that an almost-but-not-quite divorced wife took a substantial portion of the intestate estate. *See* Wilson-Cunningham v. Meyer, 820 P.2d 725 (Kan. Ct. App. 1991) (affirming summary judgment in favor of attorney and finding that children could not qualify as third-party beneficiaries of services rendered to father regarding divorce).

[11] For example, medical malpractice defendants have not infrequently sued lawyers representing malpractice plaintiffs, claiming that the lawyers had negligently failed to determine whether their plaintiffs had viable claims. However, these cases continue to be unsuccessful. *See, e.g.*, Morowitz v. Marvel, 423 A.2d 196, 200 (D.C. 1980); Brody v. Ruby, 267 N.W.2d 902, 906-07 (Iowa 1978); Friedman v. Dozorc, 312 N.W.2d 585, 591-95 (Mich. 1981).

[12] A recent ABA study contained no reported claims by non-clients against Mississippi attorneys for the years 1981-85. During the same period, the national percentage of non-client claims for all reported claims was 13.3%. *See* WILLIAM H. GATES & SHEREE C. SWETIN, AM. BAR ASS'N, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER 107, 111 (1989). For a sampling of the blossoming legal commentary on non-client malpractice claims, see Lawrence H. Averill, Jr., *Attorney's Liability to Third Persons for Negligent Malpractice*, 2 LAND AND WATER L. REV. 379 (1967); Cifu, *supra* note 8; Donald B. Hilliker, *Attorney Liability to Third Parties: A Look to the Future*, 36 DEPAUL L. REV. 41 (1986); Melinda R. Katz, Survey, *Privity Requirement for Attorney Liability to Non-clients*, 4 ST. JOHN'S J. LEGAL COMMENT. 321 (1989); Ellen S. Eisenberg, Note, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. REV. 126 (1982); Barbara L. Walker, Note, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L.J. 48 (1981).

[13] The rule requiring privity is generally traced to the decision in *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), in which an English court declined to find the manufacturer of a mail coach liable for injuries caused to a coachman when the mail coach collapsed. *Winterbottom*, 152 Eng. Rep. at 403-05. To allow a party to be liable to individuals other than the contract parties would, the court opined, lead to "the most absurd and outrageous consequences." *Id.* at 405.

[14] 100 U.S. 195 (1879).

the Supreme Court declared that "[b]eyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party."[15] The case involved an attorney's real estate title opinion made for a client who ultimately communicated the opinion to a lender in order to obtain a loan.[16] The borrower ultimately defaulted upon the loan, and the lender, who attempted to sell the property under a deed of trust, discovered that both title to the real estate and the attorney's opinion were defective.[17] The Supreme Court saw nothing in these facts to vary the traditional rule requiring privity as a foundation for a negligence action against an attorney.[18]

Until the first decades of this century, stingy notions of foreseeability and exaggerated fears of ruinous litigation continued to support a virtual unbroken homage to privity in most jurisdictions. But, as students of tort law know, privity proved to be too bitter a pill for the modern palette. In 1916, for example, Justice Benjamin Cardozo hurdled the traditional privity barrier to find that the manufacturer of a car with a defective wheel owed a duty of due care to parties in addition to those who had specifically contracted with the manufacturer, or in this case the car dealer.[19] Thus, a party purchasing

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[15] *Ward*, 100 U.S. at 200.

[16] *Id.* at 195-96.

[17] *Id.* at 197.

[18] *Id.* at 206-07. Dean Page Keeton suggested that the result in *Ward* might be supported by several considerations:

> Those who negotiate transactions should be encouraged to rely upon counsel of their own choosing employed for the very purpose of serving the interest of the person being represented. Interests of clients and others who may choose to rely on the counsel's opinion are generally not identical. Moreover, the possibility of liability to third persons for negligence in the handling of a client's affairs can often hamper an attorney's freedom to represent the client vigorously. And, finally, the foreseeable class of persons who can be adversely affected by reliance upon the lawyer's or accountant's advice or opinion can be so large as to make liability to third parties a ruinous and catastrophic kind, a burden that cannot reasonably be imposed on the lawyer or accountant except for fraud or other intentional misconduct.

Page Keeton, *Professional Malpractice*, 17 WASHBURN L.J. 445, 448-49 (1978).

[19] MacPherson v. Buick Motor Co., 111 N.E. 1050, 1055 (N.Y. 1916). Contract

a car from a dealer could sue the manufacturer for negligence.[20] Several years later, Justice Cardozo again dismissed privity as a barrier to a negligence action but in a slightly different context, in the case of *Glanzer v. Shepard*.[21] In *Glanzer*, the New York Court of Appeals held that public weighers hired by a seller to certify the weight of beans in a transaction could be liable to a buyer who had relied on the certification of weight, even though the buyer had no relationship of privity with the weighers.[22] Writing for the court, Justice Cardozo emphasized that the seller had instructed the public weighers to deliver the certification to the buyer, understanding that the buyer would rely on it.[23] "The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction."[24] Justice Cardozo distinguished *Savings Bank v. Ward* as an example of the rule that "a lawyer is not answerable . . . to a third person whom he did not mean to serve."[25] Cardozo believed a contrary rule applied with respect to "the searcher of a title who, preparing an abstract at the order of a client, delivers it to another to induce action on the faith of it."[26]

When called upon to extend the rule of *McPherson* and *Glanzer* a step further, however, Justice Cardozo declined to do so. In *Ultramares Corp. v. Touche, Niven & Co.*,[27] certified public accountants were hired by a company to prepare and

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principles, Justice Cardozo declared, would no longer provide the sole definition of legally actionable duties. *MacPherson*, 111 N.E. at 1055. "We have put aside the notion that the duty to safeguard life and limb, when the consequences of the negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law." *Id.* at 1053.

[20] *Id.*

[21] 135 N.E. 275, 276-77 (N.Y. 1922).

[22] *Glanzer*, 135 N.E. at 276.

[23] *Id.* at 276.

[24] *Id.* at 275.

[25] *Id.* at 276.

[25] *Id.* (citations omitted).

[27] 174 N.E. 441 (N.Y. 1931).

certify a balance sheet intended to reflect the financial condition of the company.[28] The accountants understood that the balance sheet would be used by the company in the course of its business, although they did not know the precise identities of those to whom the company might show the balance sheet.[29] To facilitate the company's use of the balance sheet, the auditors prepared thirty-two duplicate originals.[30] The controversy arose when the accountants gave a copy of the balance sheet to a party unknown to them, and that third party relied on it to the party's financial detriment.[31] The New York Court of Appeals held that these facts exhibited no basis for finding that the accountants owed the plaintiff a duty of due care upon which a negligence action could be framed.[32] The court stated:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.[33]

Justice Cardozo balked at exposing professionals, such as accountants, to a world where privity of contract seemed an increasingly outmoded concept.[34] But over the next half centu-

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[28] *Ultramares Corp.*, 174 N.E. at 442.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 443.

[32] *Id.* at 447.

[33] *Ultramares Corp.*, 174 N.E. at 444.

[34] *Id.* The distinction between the holdings in *MacPherson* and *Ultramares* has sometimes been explained as the result of an application of different rules to economic as opposed to physical injuries. *See* Keeton, *supra* note 18, at 446; Susan L. Martin, *If Privity is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused by Negligent Misrepresentation*, 28 AM. BUS. L.J. 649, 652 (1991). For a discussion of the current status of this distinction, see Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985).

ry, a growing number of courts proved less hesitant than he. So long as the peculiar duties of care thought owed to clients were justified solely in terms of traditional notions of privity, then the celebrated assault on the citadel of privity witnessed in this century[35] would inevitably expand the potentials of liability for lawyers, just as it had for other tort defendants such as manufacturers and, perhaps more pertinently, other professionals.[36] In fact, for such professionals as accountants and attorneys, the growing disfavor with notions of privity has fueled expanded liability.[37] As we shall see, though the citadel of privity in Mississippi is all but a heap of rubble, the potential malpractice liability of lawyers to third parties is still uncertain.

I. THE ASSAULT ON PRIVITY

In Mississippi, the likelihood of a non-client recovering from an attorney in a malpractice action took a giant step forward in *Century 21 Deep South Properties, Ltd. v. Corson*.[38] The Corsons sued a number of parties after discovering that they had purchased a house with defective title.[39] Among the defendants was an attorney, Steighner, who had prepared a title opinion for the Corsons' sellers, the Meiers, when they had

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[35] *Ultramares Corp.*, 174 N.E. at 445.

[36] For a discussion of the growing trend toward liability of professionals to third parties, see Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation,* 52 OHIO ST. L.J. 1309, 1309 (1991). At least some observers suggest that malpractice liability to third parties ought to be governed by the same standards regardless of the type of professional involved. One court has doubted "the wisdom of continuing to apply different standards for determining the liability of different professionals to third parties. . . ." Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408, 413 (Tex. Civ. App. 1986); *see also* Martin, *supra* note 34, at 651 (proposing single rule of liability for various classes of professionals).

[37] *See generally* Richard L. Miller, Note, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME L. REV. 588 (1972) (discussing impact on legal profession of accountants' liability to third parties being applied to full extent of foreseeability).

[38] 612 So. 2d 359 (Miss. 1992).

[39] *Century 21*, 612 So. 2d at 359.

themselves purchased the property at issue in the case.[40] The parties in *Century 21* stipulated that Steighner had negligently prepared the opinion in that it failed to disclose the existence of certain liens against the property and an easement problem involving the property.[41] When the Corsons decided to purchase the property, the realtor involved in the transaction informed them that they could either have a full title search done on the property or simply a title update.[42] On learning that the title update was less expensive, the Corsons elected this option,[43] and the firm of Dunn & Webb performed the update. This firm discovered that the property lacked an easement for entrance to the property, and contacted Steighner, the attorney who had rendered the previous title opinion, to resolve the problem.[44] He in fact resolved this problem and the parties closed the deal.[45] Subsequently, the purchasers attempted to obtain a second mortgage on the property.[46] The proposed lender for this transaction required a title search, and in the course of this search, a new attorney discovered that the property was subject to several unpaid liens.[47] Aggrieved and allegedly injured, the purchasers sued their sellers, their sellers' real estate broker, and attorney Steighner.[48]

Recovery by a non-client against an attorney who had performed title work negligently would have represented an important development in Mississippi law. However, it would not have been particularly remarkable. Prior to *Century 21*, Mississippi had followed the traditional rule requiring an attorney-client relationship as an essential element of a legal malpractice claim.[49] But this requirement has suffered substantial erosion in many other jurisdictions, and its demise in Missis-

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[40] *Id.* at 363.
[41] *Id.* at 363-64.
[42] *Id.* at 366.
[43] *Id.*
[44] *Century 21*, 612 So. 2d at 363.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 359.
[49] *See supra* note 4 and accompanying text.

sippi would not have been startling. With respect to liability for negligently rendered legal opinions, lawyers are increasingly subject to claims of malpractice and/or negligent misrepresentation by non-clients who are the intended recipients of the opinion letters, and who detrimentally rely on these opinions.[50] Mississippi has in fact recognized the tort of negligent misrepresentation, and this tort, if applied to attorney opinion letters, appears tailor-made for facts such as those illustrated in *Century 21*.[51] But the plaintiffs in *Century 21* had a weapon more powerful and flexible than the developing tort of negligent misrepresentation, and more sweeping than incremental erosions of the traditional privity requirement. They had section 11-7-20 of the Mississippi Code.[52]

The "assault upon the citadel of privity" that had been "proceeding in these days apace"[53] reached its triumphant con-

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[50] *See, e.g.*, Greycas, Inc. v. Proud, 826 F.2d 1560, 1565 (7th Cir. 1987) (holding borrower's attorney liable for legal malpractice and negligent misrepresentation to lender who requested and received negligently prepared opinion letter concerning existence of liens on certain collateral), *cert. denied*, 484 U.S. 1043 (1988); Central Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson, 865 P.2d 862, 865-66 (Colo. Ct. App. 1993) (finding attorney liable for negligent representation in connection with issuance of legal opinion to bank relating to bank's purchase of municipal bounds), *cert. granted*, No. 92CA0736 (Colo. Jan. 4, 1994). *See generally* Robert S. Treece & Richard D. Hall, *Attorney's Liability: Negligent Misrepresentations to Third Parties—A Growing Threat*, FOR DEF., July 1989, at 18 (listing case law from various states which have ruled on third-party negligent misrepresentation claims).

[51] *See, e.g.*, Shogyo Int'l Corp. v. First Nat'l Bank, 475 So. 2d 425, 427 (Miss. 1985); Berkline Corp. v. Bank of Miss., 453 So. 2d 699, 702 (Miss. 1984); First Money, Inc. v. Frisby, 369 So. 2d 746, 750 (Miss. 1979). Of course, the mere fact that a state recognizes the tort of negligent misrepresentation does not necessarily mean that it will apply this tort to allow recovery by third-parties who receive negligently made representations from attorneys. A number of states recognize the tort, but decline to apply it to representations made by lawyers. *See* Lawson & Mattison, *supra* note 36, at 1323-25, for a discussion of the treatment of accountants and lawyers under negligent misrepresentation theories—accountants being exposed to greater liability in some jurisdictions. As I will suggest subsequently, the chief reason for not extending liability to third-parties for negligent misrepresentations made by attorneys has to do with the unique obligations attorneys owe to their clients and the extent to which third-party liability would erode these obligations.

[52] MISS. CODE ANN. § 11-7-20 (Supp. 1993).

[53] Ultramares Corp. v. Touche, Niven & Co., 174 N.E. 441, 445 (N.Y. 1931).

clusion in Mississippi through the enactment of section 11-7-20. This section states with deceptive simplicity: "In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action."[54] Adopted by the Mississippi Legislature in 1976, this statute has hovered mostly around litigation involving construction defects or alleged breaches of warranty in connection with the sale of goods.[55] Beginning in 1987, however, section 11-7-20 found a new use in actions against professionals by individuals other than the immediate clients of those professionals. For example, in *Touche Ross & Co. v. Commercial Union Insurance Co.*,[56] the Mississippi Supreme Court relied, in part, on section 11-7-20 to determine that an independent auditor could be liable to "reasonably foreseeable users of the audit, who request and receive a financial statement from the audited entity for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss proximately caused by the auditor's negligence."[57] Subsequently, the court again turned to the no-

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[54] MISS. CODE ANN. § 11-7-20 (Supp. 1993).

[55] *See, e.g.*, May v. Ralph L. Dickerson Constr. Corp., 560 So. 2d 729, 730 (Miss. 1990) (action by owners and subsequent owners of building against general contractor for negligent construction of building and breach of implied warranties of workmanship and habitability); Hicks v. Thomas, 516 So. 2d 1344, 1348 (Miss. 1987) (action for breach of implied warranty of title in connection with sale of truck); Hargett v. Midas Int'l Corp., 508 So. 2d 663, 665 (Miss. 1987) (action by purchaser of used motor home against manufacturer for breach of implied warranty of merchantability); Fedders Corp. v. Boatright, 493 So. 2d 301, 305 (Miss. 1986) (action by purchasers of heat pump against manufacturer for breach of implied warranty of merchantability); Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 673 (Miss. 1983) (action by subsequent purchaser of home against builder-seller for negligence and breach of implied warranty); Volkswagen, Inc. v. Novak, 418 So. 2d 801, 803 (Miss. 1982) (action for breach of warranty against automobile manufacturer).

[56] 514 So. 2d 315 (Miss. 1987).

[57] *Touche Ross & Co.*, 514 So. 2d at 322. This holding represents an adoption of § 552 of the RESTATEMENT (SECOND) OF TORTS, with one important twist. Section 552 provides as follows:

(1) One who, in the course of his business, profession or employment, or

privity-requirement statute to justify its holding that a pest control operator could be liable to purchasers of property inspected by the operator for failure to do so properly, even though the purchasers were not in privity with the operator.[58]

Following these cases, and in view of the Mississippi Supreme Court's abolition of the privity requirement in medical malpractice actions on other grounds,[59] it was scarcely surprising that section 11-7-20 would appear in a legal malpractice claim. The court has emphasized that the section "means what it says."[60] Accordingly, it announced in *Century 21* that section 11-7-20 abolished the traditional privity requirement in legal malpractice actions and that "the presence or absence of an

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in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

RESTATEMENT (SECOND) OF TORTS § 552 (1977). The Restatement limits liability under this section to those whom the professional intends to supply with information or knows will be supplied the information by the professional's recipient. *Id.* § 552(2)(a). In contrast, *Touche Ross* extended liability to reasonably foreseeable recipients of the professional's information. *Touche Ross & Co.*, 514 So. 2d at 322. Thus, *Touche Ross* placed Mississippi among the handful of jurisdictions that had most greatly expanded the potential liability of accountants to third parties. *See* Lawson & Mattison, *supra* note 36, at 1322.

[58] Hosford v. McKissack, 589 So. 2d 108, 110-11 (Miss. 1991).

[59] *See* Meena v. Wilburn, 603 So. 2d 866, 869-70 (Miss. 1992) (holding, without reference to § 11-7-20, that absence of doctor-patient relationship was not necessarily fatal to medical malpractice claim asserted by individual mistakenly treated by doctor).

[60] *See Hosford*, 589 So. 2d at 110 (containing court's interpretation of § 11-7-20's purpose).

attorney-client relationship is merely one factor to consider in determining the duty owed rather than being the single factor which establishes that a duty is owed."[61] But if the court has unfettered legal malpractice actions from their traditional moorings in the attorney-client relationship, it still remains to be seen how the court will fashion appropriate standards for identifying those to whom lawyers owe the kinds of duties that will sustain a legal malpractice action.[62] In *Century 21*, the court wasted no ink in quickly concluding that a real estate seller's attorney who prepared a title report owed a duty to purchasers "to perform his work competently. . . ."[63] Consequently, it extended legal malpractice liability "to reasonably foreseeable persons who, for a proper business purpose, detrimentally rely on the attorney's title work, suffering loss proximately caused by his negligence."[64] The court explained that the use of a previously existing title opinion by an attorney hired to update the title opinion constitutes the necessary reliance.[65] "Although a copy of the title opinion is not necessary, the client of an attorney performing a subsequent update relies upon the fact that the prior title opinion revealed any encumbrances or deficiencies of title. Reliance on a licensed professional to perform his work competently is imminently reasonable."[66]

If the court merely intended this holding to make the tort

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[61] Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359, 373 (Miss. 1992).

[62] *Cf. Hosford*, 589 So. 2d at 110 ("The demise of the defense of privity removes only a formalistic barrier to recovery. It does not expose these defendants to liability to the whole world. The door opened by the demise of privity is limited by more realistic inquiries into foreseeability and detrimental reliance."). In a legal malpractice action decided by the Fifth Circuit after *Century 21* and applying Mississippi law, the court did not reach the issue of whether a non-client could assert a malpractice claim against a law firm, due to the failure of the malpractice plaintiff to present the issue in a timely fashion. *See* Hopper v. Frank, 16 F.3d 92, 95 n.2 (5th Cir. 1994) (affirming summary judgment in favor of legal malpractice defendants).

[63] *Century 21*, 612 So. 2d at 374.

[64] *Id.*

[65] *Id.*

[66] *Id.*

of negligent misrepresentation applicable to lawyers, it would be important, though unremarkable. But if *Century 21* is to be a guide for the expansion of legal malpractice claims generally by non-clients, then its discussion of the duties owed by attorneys to such non-clients is misleading. This is so because the court's opinion appears to assume that the requirement of an attorney-client relationship in legal malpractice cases is but a vestige of formal privity requirements that have been on the wane for most of this century. In fact, the traditional rule against malpractice recovery by non-clients may have had its roots in now disfavored notions of privity.[67] Courts have historically rejected non-client claims on the basis of fears of remote and ruinous liability to unknown parties. To the extent that the legal malpractice doctrine hitched itself to these decrepit conceptual wagons, it was inevitably overrun by modern notions of foreseeability and liability.[68] But sometimes, as in *Century 21*, courts have failed to examine whether the requirement of an attorney-client relationship, as a predicate for a legal malpractice claim, served purposes other than that of support for an outmoded allegiance to the concept of privity.[69]

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[67] *See* Jack W. Shaw, Jr., Annotation, *Attorney's Liability, To One Other Than His Immediate Client, for Consequences of Negligence in Carrying Out Legal Duties*, 45 A.L.R.3D 1181, 1184 (1972). Mr. Shaw observed:

> In denying liability of the attorney to one not in privity of contract for the consequences of professional negligence, the courts have relied principally on two arguments: (1) that to allow such liability would deprive the parties to the contract of control of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties. In connection with the latter point, it has been observed that if the court should go one step beyond the parties to the contract, there was no reason not to go 50 steps.

Id.

[68] *But see* Guy v. Liederbach, 459 A.2d 744, 750 (Pa. 1983) (distinguishing professional services from mass-produced products and declaring that traditional notions of privity should still be generally applicable to malpractice actions based on negligence).

[69] *See, e.g.*, Walker v. Lawson, 514 N.E.2d 629, 633 (Ind. Ct. App. 1987) (suggesting that "strict adherence to the privity requirement stems from the concern that liability for negligence [should] not extend to an unlimited and unknown number of potential plaintiffs"), *vacated*, 526 N.E.2d 968 (Ind. 1988).

II. MALPRACTICE AND THE OBLIGATIONS OF LOYALTY AND DILIGENCE

The demise of formal privity concepts should not greatly expand the duties owed by lawyers to third parties. The recognition of such duties has been and continues to be constrained by the unique role lawyers serve as partisan advocates for their clients. It is this unique role that lawyers serve, rather than any formal notions of privity, that should continue to limit most malpractice actions to those asserted by clients. Lawyers are charged with the responsibility of looking after their clients' interests with unswerving diligence and loyalty.[70] American law requires lawyers to be at least partially myopic with respect to the concerns and interests of third parties, so as to remain fixedly devoted to those of their clients. Courts should normally reject the malpractice claims of non-clients, not because non-clients fail to satisfy the requirements of formal privity, but because the recognition of general duties owed to third parties would dilute the important duties attorneys owe their clients.[71] Thus, the real barrier to most non-client malpractice actions has nothing to do with foreseeability or ruinous allocations of risk per se.[72] It is that the recognition of exten-

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[70] *See* Singleton v. Stegall, 580 So. 2d 1242, 1244-45 (Miss. 1991) (discussing attorney's duties of diligence and loyalty).

[71] *See* Parnell v. Smart, 136 Cal. Rptr. 246, 248 (Cal. Dist. Ct. App. 1977) (refusing to recognize duty owed by attorney to adversary); Lamare v. Basbanes, 636 N.E.2d 218, 219-20 (Mass. 1994) (finding that lawyer representing father in connection with divorce and charges of sexual abuse as to children of marriage could not be liable for negligence to mother and children who were in adversarial relationship with father); Spinner v. Nutt, 631 N.E.2d 542, 544-45 (Mass. 1994) (finding attorneys for trustee of trust owed no duty to beneficiaries of trust, and emphasizing that courts would not generally recognize duties to non-clients where there is conflicting duty owed to client); Friedman v. Dozorc, 312 N.W.2d 585, 591 (Mich. 1981) (finding that attorney for medical malpractice plaintiff had no duty to defendant physician to conduct reasonable investigation before bringing suit, and declaring that recognition of such duty would be "inconsistent with basic precepts of the adversary system").

[72] For the argument that courts should reject claims of liability for malpractice to non-clients, in part because it exposes attorneys to "massive malpractice liability, [and] the possibility of higher malpractice premiums," see Cifu, *supra* note 8, at 14. These kinds of arguments are variants of the traditional justifica-

sive duties to non-clients would undermine the important policies behind preservation of duties of loyalty and diligence to clients.[73]

California led the way in fostering confusion in this area. In *Biakanja v. Irving*,[74] the California Supreme Court held that a notary public who engaged in the unauthorized practice of law by preparing a will could be sued for negligence by one whose bequest failed due to lack of proper attestation of the will.[75] The imposition of liability in this case might have been justified by classing the frustrated devisee as an intended third-party beneficiary of the contract between the notary public and the testator. The California Supreme Court, relying on section 302 of the Restatement (Second) of Contracts,[76] has subsequently recognized the third-party beneficiary theory as an alternate basis of recovery by a frustrated devisee under a negligently prepared will,[77] and a number of courts have done

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tions for the privity requirement and should generally not survive the dismantling of privity. Note, however, that when fear of massive liabilities to third parties threatens to undermine attorneys' diligence towards their clients, then lawyers may use the arguments to uphold the traditional barrier against most non-client claims.

[73] The recognition of duties owed to a client's adversaries not only creates a conflict of interest between duties owed to clients and those owed to non-clients, but also a conflict between the client and the attorney whose representation may be undermined by an attorney's fear of future liability to the non-client. *See Friedman*, 312 N.W.2d at 591-92.

[74] 320 P.2d 16 (Cal. 1958).

[75] *Biakanja*, 320 P.2d at 19.

[76] The Restatement provides as follows:

> Section 302. INTENDED AND INCIDENTAL BENEFICIARIES
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> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979).

[77] *See* Lucas v. Hamm, 364 P.2d 685, 688-89 (Cal. 1961), *cert. denied*, 368

the same.[78] But in *Biakanja*, instead of following this avenue, the court affirmed judgment for the plaintiff against the notary on negligence rather than contract grounds, finding that the notary owed the intended beneficiary a duty of reasonable care even though the two were not in privity of contract.[79] To determine the existence of this duty, the court formulated the following balancing test:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[80]

Three years later the California Supreme Court applied this balancing test to find that an intended beneficiary of a will could assert a malpractice claim against the attorney who

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U.S. 987 (1962).

[78] *See, e.g.*, Ogle v. Fuiten, 466 N.E.2d 224, 227 (Ill. 1984); Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987); Guy v. Liederbach, 459 A.2d 744, 751-53 (Pa. 1983). *But see* Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987) (declining to follow third-party beneficiary rule to allow recovery by intended beneficiaries for legal malpractice); Copenhaver v. Rogers, 384 S.E.2d 593, 595-98 (Va. 1989) (foregoing application of third-party beneficiary rule). Non-clients other than the intended beneficiaries of a will have attempted, with varying success, to use the third-party beneficiary doctrine as a gateway for legal malpractice liability. *See, e.g.*, Chatterjee v. Due, 511 F. Supp. 183, 187 (E.D. Pa. 1981) (noting use of doctrine in will beneficiary cases but declining to apply it in case where mother of seaman killed in ship collision sued vessel owner's attorney for legal malpractice); Franko v. Mitchell, 762 P.2d 1345, 1355 (Ariz. Ct. App. 1988) (declining to apply third-party beneficiary theory to allow recovery by lender against borrower's attorney); Flaherty v. Weinberg, 492 A.2d 618, 620-29 (Md. Ct. App. 1985) (finding whether mortgagors who filed legal malpractice action against mortgagees' attorney were third-party beneficiaries was question of fact for jury).

[79] *Biakanja*, 320 P.2d at 19.

[80] *Id.*

drafted the will.[81] A number of jurisdictions have adopted this test.[82]

The balancing of factors test developed in *Biakanja*, and subsequently applied to legal malpractice actions brought by non-clients, is a poor standard for evaluating negligence claims because it fails to attend to the most important issue at stake. Crucial to deciding the negligence issue is not so much the foreseeability of harm to some third party or the reasonableness of making an attorney liable for risks of an uncertain amount. Rather, the chief issue is whether the duties imposed by law and professional obligation on attorneys in favor of their clients are inconsistent with the recognition of duties owing to non-clients. The California Supreme Court failed to address this issue. Had the court done so, it might have determined that in the cases of frustrated will beneficiaries, the duties owed by an attorney to a testator are not generally inconsistent with, and would not be jeopardized by, the recognition of duties owing to the non-client will beneficiaries.[83] However, the court would

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[81] *Lucas*, 364 P.2d at 685.

[82] *See, e.g.,* McAbee v. Edwards, 340 So. 2d 1167, 1169-70 (Fla. Dist. Ct. App. 1976); Auric v. Continental Casualty Co., 331 N.W.2d 325, 329 (Wis. 1983). Other courts have utilized the balancing test to impose liability for legal malpractice to non-clients other than intended beneficiaries of a will. *See, e.g.*, Fickett v. Superior Ct., 558 P.2d 988, 990 (Ariz. Ct. App. 1976) (using test to attach liability to attorney for guardian of ward); Pizel v. Zuspann, 795 P.2d 42, 49-51 (Kan. 1990) (applying balancing test to allow potential beneficiaries of inter vivos trust to assert malpractice claim against settler's attorneys). *But see* Brooks v. Zebre, 792 P.2d 196, 200-01 (Wyo. 1990) (declining to apply balancing test to allow prospective lessors of property to sue attorney for prospective lessees). *See generally* Joseph T. Kleespies, Comment, *Liability of Lawyers to Third Parties for Professional Negligence in Oregon*, 60 OR. L. REV. 375, 398 (1981) (proposing that Oregon courts adopt California test). For criticism of the balancing test, see Guy v. Liederbach, 459 A.2d 744, 750 (Pa. 1983).

[83] *See* Ogle v. Fuiten, 466 N.E.2d 224, 227 (Ill. 1984) (noting non-adversarial nature of attorney's representation of testator). The interests of a testator and the beneficiaries of a will need not always coincide. Consider the decision in Krawezyk v. Stingle, 543 A.2d 733 (Conn. 1988). There, the intended beneficiaries sued the attorneys of a deceased testator alleging that the attorneys had negligently failed to arrange a timely execution of estate documents prior to the testator's death. *Krawezyk*, 543 A.2d at 733. The Connecticut Supreme Court held that the testator's attorneys owed no duty of due care to the intended beneficiaries because "the imposition of liability to third parties for negligent delay in the

also have observed how rarely such harmony between the recognition of duties to a third party and those to a client will exist.[84]

In subsequent cases, California courts have tended to truncate the balance of factors test into the single inquiry of whether a third party was the intended beneficiary of a lawyer's service to a client.[85] For example, in *Goodman v. Kennedy,*[86] an attorney's clients were the principal officers of a corporation that sold certain shares of stock to the malpractice plaintiffs.[87] These purchasers alleged that the attorney for their sellers had advised his clients that the corporation could issue shares of stocks to the officers/clients as stock dividends and that the shares could then be sold to third parties without jeopardizing an exemption for federal stock registration requirements.[88] In rejecting this malpractice claim, the California Supreme Court placed almost exclusive emphasis on the fact that the stock purchasers were in no sense the intended beneficiaries of the lawyer's advice to his clients.[89] In light of this fact, the court

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execution of estate planning documents would not comport with a lawyer's duty of undivided loyalty to the client." *Id.* at 736. The court stated:

> Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen.

Id.

[84] *Cf.* Brooks v. Zebre, 792 P.2d 196, 200 (Wyo. 1990) (declining to allow non-client to assert malpractice claim against attorney by holding that attorney could not have assumed duty to non-client without violating primary duty owed to clients).

[85] *See* Cifu, *supra* note 8, at 9-11; Patrick E. Braun, Note, *The* Pelham *Decision, Attorney Malpractice and Third Party Non-client Recovery: The Rise and Fall of Privity*, 3 N. ILL. U. L. REV. 357, 370-72 (1983).

[86] 556 P.2d 737 (Cal. 1976).

[87] *Goodman*, 556 P.2d at 740-41.

[88] *Id.*

[89] *Id.* at 743; *see* Keeton, *supra* note 18, at 451 (discussing *Goodman*, and suggesting that advice at issue "was being rendered . . . primarily to or for the benefit of the client, even though it was his reliance that led to the indirect con-

concluded:

> To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counselling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence (as distinct from fraud or malice) by any with whom his client might deal "would prevent him from devoting his entire energies to his client's interests." The result would be both "an undue burden on the profession" and a diminution in the quality of legal services received by the client.[90]

In this guise, the balancing of factors test is reduced to a single factor, and the legal analysis tracks the third-party beneficiary analysis that some jurisdictions have adopted. Without this limitation, however, the balancing of factors test substitutes ad hoc determinations for principled and predictable analysis.[91]

In some cases the primary purpose of an attorney's service to a client is to benefit some third party, and both client and attorney give clear expression to their intent to so benefit the third party.[92] In these situations, the client is served when the third party is benefited, and diligence to a client results in advantage to another. In such cases as these, it is not unreasonable that an attorney should be liable for foreseeable harms suffered by a third party as a result of negligent execution of the client's desires. To impose such liability may in fact be the only way to enforce duties owing to the client.[93] For example,

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sequential losses suffered by subsequent purchasers").

[90] *Goodman*, 556 P.2d at 740-41 (citations omitted).

[91] *See* Guy v. Liederbach, 459 A.2d 744, 749 (Pa. 1983) (noting that balancing of factors test "has proved unworkable, and has led to *ad hoc* determinations and inconsistent results").

[92] *See* Pelham v. Griesheimer, 440 N.E.2d 96, 99 (Ill. 1982).

[93] *See* Probert & Hendricks, *supra* note 9, at 710 (finding that duty owed to beneficiary is not undue burden and that courts should allow negligence claim because it is only form of recourse for beneficiary and would deter attorney negligence in such matters).

in the area of will drafting, a testator will not be able to sue the attorney for negligence if the will does not properly reflect and effectuate the testator's desires. Only the will beneficiaries survive to challenge an attorney's negligence. In such cases, granting the beneficiaries the ability to sue the testator's attorney for negligence serves to strengthen the incentive for loyal and diligent service of the attorney's client, the testator.[94] It is therefore not surprising that the greatest inroads on the traditional privity requirement in legal malpractice actions have occurred in cases involving claims by intended beneficiaries of a will for negligent drafting of the will.[95] Mississippi has not yet had a published decision on this point, but when the issue arises, Mississippi should join the majority of jurisdictions which have extended malpractice-creating duties to third-party

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[94] *See* Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987) (finding that "because the testator's estate generally will have little incentive to challenge the lawyer's action, the potential for liability likely motivates the lawyer to draft and execute testamentary instruments with great care" (citations omitted)); Auric v. Continental Casualty Co., 331 N.W.2d 325, 328 (Wis. 1983) (noting that rule allowing recovery by intended beneficiaries serves to "make attorneys more careful in the execution of their responsibilities to their clients").

[95] Many jurisdictions allow frustrated beneficiaries to sue attorneys who drafted wills. *See, e.g.,* Garcia v. Borelli, 180 Cal. Rptr. 768, 772 (Cal. Ct. App. 1982); Needham v. Hamilton, 459 A.2d 1060, 1063 (D.C. 1983); Arnold v. Carmichael, 524 So. 2d 464, 467 (Fla. Dist. Ct. App. 1988); McAbee v. Edwards, 340 So. 2d 1167, 1169-70 (Fla. Dist. Ct. App. 1976); Ogle v. Fuiten, 466 N.E.2d 224, 227 (Ill. 1984); Schreiner v. Scoville, 410 N.W.2d 679, 682 (Iowa 1987); Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987); Guy v. Liederbach, 459 A.2d 744, 751-53 (Pa. 1983); Stangland v. Brock, 747 P.2d 464, 470 (Wash. 1987) (en banc); Auric v. Continental Casualty Co., 331 N.W.2d 325, 329 (Wis. 1983). *But see* Deeb v. Johnson, 566 N.Y.S.2d 688, 689 (N.Y. App. Div. 1991). *See generally* RONALD E. MALEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 26.4, at 595 & n.9 (3d ed. 1989) (citing this as clear majority rule and citing jurisdictions in which it has been adopted). Several commentaries provide a general discussion of this subject. *See, e.g.*, Helen B. Jenkins, *Privity—A Texas-Size Barrier to Third Parties for Negligent Will Drafting—An Assessment and Proposal*, 42 BAYLOR L. REV. 687 (1990); Bonnie L. Rawlins, *Liability of a Lawyer for Negligence in the Drafting and Execution of a Will*, 6 EST. & TR. Q. 117 (1983); Matthew R. Bogart, Comment, *Legal Malpractice for the Negligent Drafting of a Testamentary Instrument:* Schreiner v. Scoville, 73 IOWA L. REV. 1231 (1988); Barbara M. Theberge, Note, *Attorney Negligence in Real Estate Title Examination and Will Drafting: Elimination of the Privity Requirement as a Bar to Recovery by Foreseeable Third Parties*, 17 NEW ENGL. L. REV. 955 (1981-82).

will beneficiaries. However, the Mississippi Supreme Court's decision in *Century 21* did not involve such a situation, and its explanation and limits must be discovered elsewhere.

III. Lawyer Opinions and Third Parties

Century 21 illustrates a common lawyering role: the delivery of a legal opinion at the request of the client for the benefit of some third party. Lawyers routinely proffer such opinions.[96] Professor Bryn Vaaler has suggested that "[n]early all significant financing or acquisition transactions in the United States today are conditioned on the delivery by one party to the other party or parties at closing of a legal opinion letter."[97] According to Vaaler:

> Opinion items common to many types of transactions . . . include: due incorporation, valid existence and good standing of the client corporation; power of the client corporation to own its properties and conduct its business; due authorization, valid issuance and non-assessability of the outstanding stock of the client corporation; the legal, valid, binding and enforceable nature of the agreements embodying the transaction; and the power of the client corporation to enter into the

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[96] *See, e.g.*, John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235, 251-65 (surveying recent decisions bearing on business lawyers' accountability for legal opinions); Richard R. Howe, *The Duties and Liabilities of Attorneys in Rendering Legal Opinions*, 1989 COLUM. BUS. L. REV. 283, 283 (exploring conflicts between attorneys' role as "advocate, negotiator, and implementer on the one hand, and as opinion giver on the other"); Treece & Hall, *supra* note 50, at 19-21 (outlining present state of attorney liability to third parties for negligent misrepresentation); Leslie L. Gardner, Note, *Attorney Liability to Third Parties for Corporate Opinion Letters*, 64 B.U. L. REV. 415 (1984) (discussing general content and purposes of corporate opinion letters); Theberge, *supra* note 95, at 958-77 (discussing attorney liability to third persons with regard to lack of privity defense). On occasion, a court that concludes as a technical matter that a particular attorney did not have a professional relationship with an individual will nevertheless conclude that the attorney owed a fiduciary duty to the individual. *See, e.g.*, Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645, 647-49 (Mich. Ct. App. 1981) (concluding that attorney for professional corporation owed fiduciary duty to one of two 50% shareholders of corporation, even though shareholder was not technically client).

[97] Bryn Vaaler, *Bridging the Gap: Legal Opinions as an Introduction to Business Lawyering*, 61 U. MO. KAN. CITY L. REV. 23, 27 (1992) (footnote omitted).

> agreements (due authorization of the client corporation to perform the transaction and absence of conflicting contractual obligations or laws).[98]

It is conceivable that the lawyerly work of rendering a legal opinion to a third party might constitute a lawyer's only participation in a transaction. More frequently, however, the lawyer will perform a number of roles in a particular transaction—counselor, negotiator, advocate, etc.—of which the opinion-giving role will be only one of many. In exercising these various roles, the attorney will take a stance at least partially adversarial—and frequently significantly so—towards the third-party recipients of an opinion.

One should note that the third-party opinion case and the will beneficiary case share some common elements, but also differ in important respects. In both cases a consequence of the attorney-client relationship is the providing of a benefit to a third party: in the will-drafting case, the legal funneling of the testator's assets; in the opinion-rendering case, the provision of or verification of information important to the third party's willingness to consummate a transaction. The opinion and will-drafting cases differ, however, in the connection between the client's intent and the benefit proposed to be rendered to the third party. In the will-drafting case, the receipt of a benefit by the third party is the essence of the client's intent. If the lawyer negligently causes the benefit to fail, the client's intent is directly frustrated. The opinion case differs from that scenario, however, in that negligent rendering of a legal opinion may not necessarily frustrate the client's intentions. A client typically seeks an opinion from a lawyer because some other party requires such an opinion as a condition for dealing with the client. The client may not have much interest in the diligence with which an attorney renders this opinion, so long as it is rendered in such a fashion as to satisfy the demands of the

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[98] *Id.* (footnote omitted). For a valuable practice treatise on this subject, see SCOTT FITZGIBBON & DONALD W. GLAZER, FITZGIBBON & GLAZER ON LEGAL OPINIONS: WHAT OPINIONS IN FINANCIAL TRANSACTIONS SAY AND WHAT THEY MEAN (1992 & Supp. 1994).

third party.[99] In fact, a client may have an interest in frustrating the attorney's work of rendering a truthful opinion, if a diligently prepared opinion will reach a conclusion not satisfactory to the third party, thus preventing the consummation of the client's transaction with that party.[100] Consequently, the client's intent with respect to an opinion letter is not necessarily to benefit the third party, but rather to consummate a deal. Any benefit to a third party, therefore, is merely incidental to the principle aim of the client: to close the deal.[101] In the case of an opinion letter, then, the third party is not a surrogate client, although the intended beneficiary of a will might well be called precisely this. If the lawyer who negligently drafts an opinion letter is liable to a third party, it is not because the third party somehow stands in the client's shoes, but because other considerations dictate that the lawyer owes the third party a duty of care not wholly derivative of any duty of care owed to the client.[102]

I have argued above that the principle reason for limiting liability of lawyers for negligence to third parties is the potential of such liability to dilute the important duty of loyalty

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[99] *See* Vaaler, *supra* note 97, at 51 ("A client intent on closing a transaction may want its lawyer to render whatever opinion is being demanded no matter how unreasonable.").

[100] *See* Thomas L. Ambro & J. Truman Bidwell, Jr., *Some Thoughts on the Economics of Legal Opinions*, 1989 COLUM. BUS. L. REV. 307, 312 (explaining how clients sometimes fail to understand attorneys' inability to render requested opinion); Lawson & Mattison, *supra* note 36, at 1316-17 (suggesting that in spite of attorney's duty to pursue interests of client zealously, attorneys involved in rendering opinions may be more "adversarial" toward client than are accountants).

[101] It is true that a negligently prepared opinion may expose the client to liability from the third party or frustrate consummation of the transaction in question. *See* Kleespies, *supra* note 82, at 387 (indicating that clients would expect equal thoroughness in opinions whether they are prepared for others or themselves). However, the client might be willing to risk these adverse consequences rather than see the third party receive an opinion with accurate information and opinions.

[102] Some commentators have argued, nevertheless, that third-party beneficiary theories are an appropriate basis for finding liability to non-clients for negligently rendered legal opinions. *See* Gardner, *supra* note 96, at 426-28 (suggesting use of third-party beneficiary liability but contending that only addressees of legal opinion would constitute intended beneficiaries).

owed by a lawyer to his or her client. Now, however, it must be admitted that this point alone is not sufficient to justify an absolute barrier against third-party recovery. This is so because modern legal ethics has recognized that while lawyers owe their chief obligations to their clients, they do owe some obligations to others as well—to the courts for instance, and even to third parties.[103] Although lawyers may once have rallied around Lord Brougham's famous adage that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client,"[104] the actual ethical responsibilities of modern-day lawyers are somewhat more complicated. The multiple duties that lawyers now assume when they undertake the work of the law create possibilities for uncertainty and conflict.[105] But the mere fact that duties owed to parties other than a client might tend to undermine the attorney-client relationship has not been decisive in other battles concerning legal ethics. It should not, accordingly, be decisive as to the question of whether lawyers who render third-party opinions may be liable for negligence to the recipients of those opinions.

An analysis of the potential liability of lawyers for negligently rendered opinions to third parties should begin by focusing on the economic role of lawyers in the transactions in which they render such opinions. This role might be described as that

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[103] For an exhaustive survey of the responsibilities of lawyers to various interests, see Note, *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547 (1994). For a brief description of duties owed to third parties, see Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the* Kaye Scholer *Case*, 26 AKRON L. REV. 395, 398-405 (1993).

[104] 2 JOSEPH NIGHTINGALE, TRIAL OF QUEEN CAROLINE 8 (1978).

[105] The Model Rules of Professional Conduct recognize that lawyers owe duties to interests other than those of their clients alone. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983) (allowing for disclosure of client confidences in some circumstances to prevent physical harm to third parties); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(b) (1983) (similarly allowing disclosure of client confidences in some circumstances to safeguard candor to tribunals); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1983) (generally recognizing duties of fairness to opposing parties and counsel); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1983) (recognizing duty of truthfulness to others).

of an informational guarantor. Lawyers, of course, are not "guarantors" in the sense that they may be liable to their clients or any other parties for any and every informational error; only *negligent* errors will give rise to liability.[106] But lawyers do provide assurances of particular facts important to the valuation of a transaction by the parties. These assurances reduce the risk of informational uncertainty, and thus add value to the transactions in which they are embedded. In this sense I think it may be helpful to think of an attorney in the third-party opinion context as a kind of guarantor.

A key aspect of a lawyer's service as an informational guarantor is that its value to the transaction hinges on a certain distance or separateness between the interests of the client and those of the lawyer. Were there no such distinctness, the client's representation as to certain facts would be sufficient, and nothing would be gained by an additional guarantor. However, a lawyer, even one who seeks to diligently represent the interests of a client, has interests of his or her own as well.[107] The use of legal opinions is designed to tap into these differing interests and thus add value to transactions.

One way of capturing the value brought to a transaction in the form of a legal opinion is to describe the lawyer rendering the opinion as a "reputational intermediary."[108] This is to say

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[106] *See, e.g.,* Central Bank Denver, N.A., v. Mehaffy, Rider, Windholz & Wilson, 865 P.2d 862, 865 (Colo. Ct. App. 1993) (holding that non-client may assert claim against attorney for negligent misrepresentation), *cert. granted*, No. 92CA0736 (Colo. Jan. 4, 1994); *see also* Howe, *supra* note 96, at 290 (describing liability of attorneys in connection with opinion letters as based upon general principles of tort liability); Gardner, *supra* note 96, at 433 (explaining how negligence standard may allow some room for mistake).

[107] I do not propose to stake out a position here on the question of whether the practice of law is a business or a profession, though were I to do so, I would probably argue that it is a combination of both. It is enough to note, however, that the financial interests of lawyers in the practice of law have gained increasing publicity over the last three decades. Periodicals such as *The American Lawyer* have vividly focused on the business aspects of a law practice. Moreover, the proliferation of legal advertising in the wake of Bates v. State Bar of Ariz., 433 U.S. 350 (1977), makes it increasingly difficult to conceal the profit-making aspects of law practice. *See* Gillers, *supra* note 5, at 12 (tracing increasing liability of lawyers to *Bates*).

[108] *See* Ronald J. Gilson & Reinder H. Kraakman, *The Mechanisms of Market*

that an attorney, in rendering an opinion, lends his or her reputation as a guarantor of the veracity of asserted facts important to a transaction. The attorney, who will participate in future transactions as a reputational intermediary, understands that a discredited performance of this role in a present transaction will adversely affect future opportunities to serve in the same capacity:

> [T]he intermediary expects future transactions in which it again will pledge its reputation. If the intermediary cheats in one transaction—by failing to discover or disclose seller misrepresentations—its reputation will suffer and, in a subsequent transaction, its verification will be less completely believed. The result will be a smaller increase in the value of the subsequent transaction because of the intermediary's participation and, in turn, a lower payment to the intermediary.[109]

Thus, the lawyer's reputation, and the economic consequences of its enlargement or diminishment, either validates or discredits the lawyer's certification of particular facts or opinions.[110] The lawyer's self-interest in preserving his or her reputation creates an incentive to act reasonably in any certification. This provides a ground by which third parties can rely upon the lawyer's certification, other than increasing transactional costs by paying someone else to discover and certify important information or discounting the consideration they are willing to offer in a transaction to account for the risk of informational uncertainty.

Efficiency, 70 VA. L. REV. 549, 604-07, 618-21 (1984) (developing concept of reputational intermediary).

[109] Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 290 (1984).

[110] Gilson, *supra* note 109, at 290. Gilson suggests that in addition to the possible consequences that lawyers rendering deficient opinions will suffer as to their reputations, they also may be subjected to "a small risk of liability based on the rendering of an incorrect opinion." *Id.* at 292 n.142. Others suggest that although lawyers face some risk of liability for negligently rendered opinions, the more real threat posed by such opinions is the damage to a lawyer's reputation. *See* Ambro & Bidwell, *supra* note 100, at 313.

Of course, allowing a lawyer to participate in the dual role of advocate and informational guarantor increases the possibility of a conflict between the lawyer's interests and those of the client. This fact alone, however, is hardly unusual. In other contexts, lawyers possess discrete interests from those of their clients, and this divergence of interests is not in and of itself necessarily forbidden. A lawyer who takes a contingent fee, for example, participates in a lawsuit essentially in the same dual roles as the lawyer who serves as an informational guarantor. The lawyer is both an adversarial agent and a kind of principal, with a stake in the litigation inconsistent with that of a mere agent. The law permits this otherwise troubling deviation from normal conflict of interest principles because of the value of contingent fee arrangements within the economy of providing legal services.[111] In a similar way, the law should allow attorneys to serve as informational guarantors—whether the consequences for negligent performance of this role are merely reputational or include possible civil liability as well—because of the valuable service that lawyers provide to a wide variety of financial transactions in this role.

Having characterized the opinion-giving lawyer's role as that of informational guarantor, it is possible to suggest several reasons why liability to non-clients for negligence might arise out of this role. In the first place, recall the notion of the lawyer giving an opinion as a "reputational intermediary." This characterization posits that a lawyer's self-interest in preserving a good reputation is an adequate assurance to third parties

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[111] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c), (d) (1983) (permitting contingency fee arrangements so long as they are in writing and fee is not one in "a domestic relations matter; the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or [a] contingent fee for representing a defendant in a criminal case"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(j) (1983) (generally forbidding lawyers to acquire property interests in cause of action but allowing lawyer to "contract with a client for a reasonable contingent fee in a civil case"). For the conflicts that contingency fee agreements may pose between the interests of attorney and client, see CHARLES WOLFRAM, MODEL LEGAL ETHICS 529 (1986) (describing lawyers on contingent fees as having incentive to make "quick kills" resulting in conflicts between attorney and client).

of the lawyer's due care and diligence in rendering an opinion. But suppose that modern conditions of legal practice have increased the chances that lawyers may act negligently in particular transactions and suffer either little or no adverse reputational consequences. If this is so, then one might argue that the reputational incentives that once guaranteed the reliability of lawyers' opinions no longer provide such assurance. To preserve the economic value of lawyers' opinions, some other incentive must exist to assure that lawyers will perform with due care their roles as opinion givers. This other incentive, one might suggest, could be civil liability for negligently rendered opinions.[112]

In the second place, recall the suggestion that the value of the lawyer's guaranty of information hinges greatly on the separateness of the interests of lawyer and client. In a sense, by rendering an opinion, a lawyer becomes a discrete participant in a transaction rather than a mere advocate for a client. Just as a financial guarantor in a loan transaction adds to the number of principals in the transaction, the lawyer as informational guarantor becomes in essence an additional principal. By undertaking the role of informational guarantor, a lawyer steps at least partially out of the role of advocate or counselor and into that of a real party to the transaction.[113] This fact is important since settled tort concepts make a lawyer liable for torts committed as a principal rather than a mere agent.

Finally, another way of conceptualizing the attorney's third-party opinion is to view it as a kind of product deliberate-

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[112] *But see* Gardner, *supra* note 96, at 420 (suggesting that threat of third-party suits for negligently rendered opinions might cause attorneys to limit number of opinions they are willing to offer). No doubt a number of considerations would affect the willingness of attorneys to render opinions. It does not seem likely, however, that the threat of third-party liability will discourage lawyers from rendering opinions, at least so long as insurance remains available to protect against this threat. In fact, as I argue in the text, the possibility of third-party recourse against attorneys may increase the value of such opinions and therefore increase the market for them.

[113] *See* Hilliker, *supra* note 12, at 42 (suggesting that lawyers "have become central players in the financial markets because legal services are essential to the successful sale of securities and the takeover of companies").

ly introduced by the attorney into the stream of commerce. Just as other product distributors may be liable for their negligence in connection with products introduced into the stream of commerce, attorneys may also be liable for negligent legal opinions launched into the flurry of commercial dealings.[114]

The foregoing considerations suggest why lawyers might be liable to the recipients of opinions negligently rendered to third parties. But how far should this liability extend? Should this exception to the normal principle that only clients can sue lawyers for negligently inflicted injuries extend merely to the addressees of an opinion, or to its foreseen recipients, or to any foreseeable recipient? What many attorneys will find especially troubling about the holding of *Century 21* is the court's potentially far-reaching determination that liability for negligently rendered title opinions extends to foreseeable recipients of that opinion who detrimentally rely on the representations made therein. At least in the case of accountant liability to third parties, the court specifically addressed the question of how far third-party liability ought to extend: whether to the addressee of an opinion, or to all foreseen third parties, or to all *foreseeable* third parties.[115] The court ultimately determined that accountant liability for negligently rendered opinions ought to extend to the furthest of these three opinions, to all foreseeable third parties who detrimentally rely on an accountant's opinion.[116] The court stated, erroneously I think, that Mississippi's no-privity-requirement statute[117] foreclosed the possibility of

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[114] *Cf. id.* at 43 (suggesting that increasing emphasis in legal profession on competition and provision to clients of "quality product" may lead to expanded liability to third parties). *But see* Greycas, Inc. v. Proud, 826 F.2d 1560, 1564 (7th Cir. 1987) (suggesting that information providers may be subjected to less extensive possibilities of liability than manufacturers of products because such providers, though participating in socially valuable enterprise, cannot readily capture full value of their service in fees and other remuneration), *cert. denied*, 484 U.S. 1043 (1988). The court in *Greycas* relied on the work of William Bishop. *See generally* William Bishop, *Negligent Representation Through Economists' Eyes*, 96 LAW Q. REV. 360 (1980).

[115] *See* Touche Ross & Co. v. Commercial Union Ins. Co., 514 So. 2d 315, 321-23 (Miss. 1987).

[116] *Touche Ross & Co.*, 514 So. 2d at 322.

[117] MISS. CODE ANN. § 11-7-20 (Supp. 1993).

limiting liability only to known third parties.[118] The Mississippi Supreme Court attributed this view of the appropriate limit to third-party liability to the decision in *Credit Alliance Corp. v. Arthur Andersen & Co.*[119] In order to recover against an accountant, the test in *Credit Alliance Corp.* required third parties to demonstrate:

> (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.[120]

This test clearly applies, at least in part, to parties not necessarily in privity with the accountants. Since it extends liability beyond the bounds of privity, it is consistent with the policy of Mississippi's no-privity-requirement statute, which does the same. Having rejected the possibility of limiting accountant liability to known third parties, the Mississippi Supreme Court in *Touche Ross & Co.* then quickly dismissed the Restatement position which extends liability to certain *foreseen* third parties but not necessarily to *foreseeable* ones.[121] The court characterized this distinction as drawing "'an arbitrary limit on the class of potential plaintiffs.'"[122] It found support in a student commentary on the subject which argued that it was not reasonable to prefer a foreseen user of an audit report from a foreseeable one since "'[n]either party pays for the audit, and neither party is owed a greater duty of care from the accountant.'"[123]

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[118] *Touche Ross & Co.*, 514 So. 2d at 321.

[119] 483 N.E.2d 110 (N.Y. 1985).

[120] *Credit Alliance Corp.*, 483 N.E.2d at 118.

[121] *Touche Ross & Co.*, 514 So. 2d at 321.

[122] *Id.* (quoting Robert E. Pace, Note, *Negligent Misrepresentation and the Certified Public Accountant: An Overview of Common Law*, 16 SUFFOLK U. L. REV. 431, 445-56 (1984)).

[123] *Id.* (quoting Mark D. Boveri & Brent G. Marshall, Comment, *The Enlarging Scope of Auditors' Liability to Relying Third Parties*, 59 NOTRE DAME L. REV. 281, 287 (1983)).

In *Century 21*, the Mississippi Supreme Court made no effort to explain its decision to extend attorney malpractice for negligently rendered title opinions to the same far reaches as it had established for accountants. Liability was found to extend to foreseeable third parties who detrimentally relied on the title opinion.[124] The court's one attempt at justifying this rule was to state simply that "[r]eliance on a licensed professional to perform his work competently is imminently reasonable."[125] Is it reasonable, though? In *Century 21* the malpractice plaintiffs had specifically decided to forego a full title search and to rely instead on a title update. Why did they do this? Because it was cheaper to have an update performed than to request a full title search. Why is it reasonable for one party to forego obtaining legal services specifically tailored to his or her circumstances and to choose, for purely financial considerations, to piggyback upon legal services performed for another individual? At least from one perspective, the plaintiffs in *Century 21* seem to have received a free ride with the blessing of the court.

This may in fact be a proper result, though. The attorney who prepares a title certification is performing legal work that is largely independent of the specific characteristics and needs of the present parties to a transaction. The legal service is accordingly fungible, and may readily be used by other remote parties who need not be concerned that the title opinion will be client-specific and therefore somehow not quite applicable to them.[126] A title certification is something like a product that may be used by one consumer and then transferred to another consumer for repeated use. Economically, it makes sense to encourage repeated use of this title opinion, rather than to adopt a legal rule which would encourage duplication of the work embodied by the opinion. Now, as to the free-rider prob-

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[124] Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359, 373 (Miss. 1992).

[125] *Century 21*, 612 So. 2d at 373.

[126] This is a reason for suggesting a range of liability comparable to the liability a manufacturer may be exposed to by a defective product. The title opinion is essentially a discreet package of information comparable to a product. Its value is not typically client-specific.

lem, it is probably illusory. At least after *Century 21*, attorneys preparing a title certificate will understand that they may be liable to foreseeable but relatively remote users of the certificate. Their risks, in short, will be greater. No doubt, astute attorneys will attempt to compensate for this increased risk by charging a higher fee to the immediate recipients of their opinions.[127] These recipients, though, will in turn pass this cost along ultimately to their purchasers. These purchasers, then, will not really receive a free ride when they decide to forego a full title search and instead commission an update. Their purchase price will reflect the higher attorneys' fees incurred by their sellers in an earlier transaction.[128]

It may be the case, however, that other kinds of legal opinions are not so fungible as a real estate title certification. Some opinions may be embedded in specific transactions whose particular details influence both the content of the opinion and the manner in which it is prepared by an attorney. Such contextually-bound opinions might be so restricted in scope that reliance on them by anyone except the involved party to the transaction who requested the opinion would be unreasonable. In such a case, the broad rule of liability stated in *Century 21* would be inappropriate.

It is not clear whether attorneys will be able to take steps to limit their potential liability to third parties who rely on opinions issued by such attorneys. In *Touche Ross & Co. v. Commercial Union Insurance Co.*, the Mississippi Supreme Court suggested that an auditor "remains free to limit the dissemination of his opinion through a separate agreement with the audited entity."[129] This seems to suggest that attorneys would be wise to structure agreements with their clients

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[127] Compare the suggestion that accountants found liable for negligently inflicted economic damages may protect themselves by passing on the costs of their risks to their clients. Rabin, *supra* note 34, at 1537 n.74.

[128] *See generally* Hilliker, *supra* note 12, at 63 (suggesting that in context of liability for negligently rendered legal opinions "it seems inevitable that lawyer liability will be extended in the coming years to the limits of foreseeability").

[129] Touche Ross & Co. v. Commercial Union Ins. Co. 514 So. 2d 315, 323 (Miss. 1987).

so as to limit the freedom of the client to distribute the attorney's opinion. But, of course, distribution of the opinion, at least of a limited nature, is precisely the aim of many attorney opinions. So how would an attorney limit third-party recipients' distribution of the opinions to more remote third parties? In the case of third-party addressees of a legal opinion—a lender, for example, who requires an opinion from the borrower's attorney—the addressee is by definition a party not in privity with the attorney. The attorney has no contract with the addressee, and therefore may not be able to obtain an agreement from the party limiting dissemination of a legal opinion.

An attorney might be able to limit reliance on an opinion by remote third parties by attempting to foreclose such reliance in the written opinion itself. Suppose, for example, that a legal opinion delivered to a particular addressee contains language stating that the opinion may only be relied upon by that addressee.[130] In this case, if a third party other than the ad-

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[130] Consider, for example, the Illustrative Opinion set forth in the Silvarado Accord. This Accord, the product of a 1989 conference on third-party legal opinions conducted by the American Bar Association's Business Law Section, contains the following provision:

> Only the Opinion Recipient is entitled to rely upon or to assert any legal rights based upon the Opinion Letter, and the Opinion Recipient may rely on the Opinion only for the purpose contemplated by the Transaction Documents. If a different arrangement is intended, the Opinion Letter or a separate writing signed by the Opinion Giver should specify any other person entitled to rely, and (if relevant) under what circumstances and to what extent. Without the Opinion Giver's prior written consent, the Opinion Letter may not be used or relied upon by the Opinion Recipient except for its use (i) in connection with review of the Transaction by a regulatory agency having supervisory authority over the Opinion Recipient or other person, for the purpose of confirming the Opinion's existence, (ii) in connection with the assertion of a defense as to which the Opinion is relevant and necessary, or (iii) in response to a court order.

Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association, 47 BUS. LAW. 167, 217 (1991). The Silvarado Accord defines the "Opinion Recipient" as "the addressee or addressees of the Opinion Letter." *Id.* at 181. The Accord includes a sample opinion letter with the following provision as its concluding paragraph:

> A copy of this Opinion Letter may be delivered by you to [lending

dressee were to seek recovery for a negligently rendered opinion, the opining attorney would no doubt argue that any detrimental reliance by the third party on the opinion was unreasonable in light of the language of the opinion itself.[131] But note that the language in question does nothing to alert a non-addressee of any reason for not relying on the opinion other than the desire of the opinion-giver that the letter should not be so relied upon. Is it necessarily unreasonable to rely upon representations made by a party such as an attorney when the attorney makes it known that he does not wish to be relied upon? Probably not. The attempt to ward off reliance may then be unsuccessful in actually barring third-party claims, though attorneys should no doubt use disclaiming language in hopes that the language itself will persuade third parties *not* to rely upon a particular legal opinion.[132]

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bank] [syndicate participants] [subsequent purchasers] [rating agency] [other] in connection with [state purpose], and such [person] [persons] may rely on this Opinion Letter as if it were addressed and had been delivered to [it] [them] on the date hereof. Subject to the foregoing, this Opinion Letter may be relied upon by you only in connection with the Transaction, and may not be used or relied upon by you or any other person for any purpose whatsoever, except to the extent authorized in the Accord, without in each instance our prior written consent.

Id. at 223.

[131] Neither Touche Ross & Co. v. Commercial Union Ins. Co., 514 So. 2d 315 (Miss. 1987), nor Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992), suggest specifically that reliance on a professional's opinion must be reasonable. Both cases indicate rather that the reliance must be "for a proper business purpose." *See Century 21*, 612 So. 2d at 374; *Touche Ross*, 514 So. 2d at 322. This limitation on reliance seems to cover instances where the lack of a proper business purpose would make reliance unreasonable, but does not specifically address those instances where the reliance is made pursuant to a proper purpose but is nevertheless unreasonable because of particular circumstances. In both contexts, I suggest, a requirement of *reasonable* reliance should be a prerequisite to recovery by a third party.

[132] At least two states have attempted to give attorneys some ability to limit their exposure to non-clients by allowing attorneys to give written notification to clients and intended beneficiaries of the attorneys' work that only particular persons may rely on the work. *See* ARK. CODE ANN. § 16-114-303 (Michie Supp. 1993); ILL. ANN. STAT. ch. 225, para. 450/30.1 (Smith-Hurd 1993).

IV. CONCLUSION

The demise of the privity requirement in Mississippi legal malpractice actions should not greatly expand the liability of attorneys to non-clients. In adversarial contexts, for example, the lawyer's duties of loyalty and diligent representation should virtually always trump any asserted claims by adversaries that they be protected from negligent harms occasioned by an opponent's attorney.[133] Furthermore, to the extent that most legal services to clients partake at least partially of an adversarial nature, only exceptional circumstances, closely defined by the courts,[134] should justify the real threat to attorney-client relations that third-party liability would pose. As I have argued above, liability in some circumstances is justified. But courts in this area, including the Mississippi Supreme Court, would do well to proceed slowly, being cautious that broadly stated rules of third-party liability do not fundamentally change, but rather weaken, the bonds between attorneys and their clients.

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[133] *See* Probert & Hendricks, *supra* note 9, at 716 ("[T]he priority of a lawyer's duty and loyalty to a client in litigation and other adversarial situations practically precludes a finding of duty to the adversary.").

[134] The issue of whether an attorney owes a duty of due care to a non-client should in all cases be one of law, to be addressed by the courts. *See, e.g.,* Goodman v. Kennedy, 556 P.2d 737, 742 (Cal. 1976).

PARENTAL CONSORTIUM: ASSESSING THE CONTOURS OF THE NEW TORT IN TOWN

Johnny Parker[*]

I. INTRODUCTION

A. Historical Development of Consortium

"The genius of the common law is its ability to adapt itself to the changing needs of society."[1] An excellent example of this genius is the cause of action sounding in loss of parental consortium.[2] The action for loss of parental consortium is a recent development having its genesis in the tort of loss of consortium. Loss of consortium seeks to protect the interest each spouse has in the marital relationship.[3] At early common

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[1] Moran v. Quality Aluminum Casting Co., 150 N.W.2d 137, 141 (Wis. 1967).

[2] Parental consortium is defined as the love, care, companionship and guidance given by a parent to a child. Williams v. Hook, 804 P.2d 1131, 1132 n.1 (Okla. 1990); Ueland v. Reynolds Metals Co., 691 P.2d 190, 191 (Wash. 1984); cf. TEXAS PATTERN JURY CHARGES 7.11A (2d ed. 1987) (defining "parental consortium" as "positive benefits flowing from parents' love, affection, protection, emotional support, services, companionship, care and society"). Texas' use of the word "services" seemingly causes its definition of parental consortium to be broader than that followed in Washington and Oklahoma. However, the word "services" does not broaden the elements of damages recoverable in a parental consortium claim because "services" has been construed to mean only a non-pecuniary loss. Reagan v. Vaughn, 804 S.W.2d 463, 464 (Tex. 1990); *see infra* note 143 and accompanying text.

[3] Loss of consortium is a separate and independent action that compensates one spouse for a negligent injury to the other. An all encompassing definition of loss of consortium does not exist. The term consortium, at early common law was used to describe the husband's right to his wife's assistance, services, society, companionship and sexual relations. *See infra* notes 4, 14.

law, the action for consortium protected only the economic interest that a husband had in his wife and children.[4] Con-

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> Today, consortium is no longer limited to injured spouses. It has come to represent losses suffered as a result of the injury or death of any family member. Nor is consortium concerned with simple loss of services; in essence, the lowest common denominator of the interest protected by the consortium claim is that of "lost society and companionship."

Michael A. Mogill, *And Justice for Some: Assessing the Need to Recognize the Child's Action for Loss of Parental Consortium*, 24 ARIZ. ST. L.J. 1321, 1324 (1992).

It is uniformly agreed that impairment of any "material" or "sentimental" aspects of the marital relation is compensable. Material aspects are viewed as economically quantifiable losses, while sentimental aspects correspond to those losses not susceptible to exact market valuation. Susan G. Ridgeway, Comment, *Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres*, 50 MONT. L. REV. 349, 350 (1989). The notion that loss of consortium is concerned with material and sentimental losses is often obscured by jury instructions which state that the complaining spouse is entitled to recover damages for loss of the other's "society, companionship, affection, sexual relation and services." Further confusion arises from the use of the word "services" which is defined in a number of jurisdictions to include both the sentimental and material aspects of the action. "Regardless of how [jurisdictions] characterize consortium, all courts evaluate the same factors as proof of impairment of consortium." *Id.* at 351. *See generally* Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923) (containing historical account of consortium); Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930) (same).

In Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978), the Texas Supreme Court stated that:

> The phrase loss of consortium is more accurately described as an element of damage rather than a cause of action. But courts have so frequently used the phrase to denote those actions in which loss of consortium is the major element of damage that loss of consortium has come to be referred to as a cause of action.

Whittlesey, 572 S.W.2d at 666 n.1.

[4] In Lynch v. Knight, 11 Eng. Rep. 854, 863 (Ex. Ch. 1861), Lord Wensleydale, writing for the court, observed that "[t]he loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy." This passage was construed in America to mean that the action for loss of consortium encompassed only damages for services, which belonged exclusively to the husband, and not the intangible elements of harm to society and affectionate attention. *See infra* notes 14, 15.

Prior to the Married Women's Property Act, women were considered as one with their husbands. Women had no status to sue on their own behalf for wrongs done against them. The husband, however, had standing to sue for the damages

sequently, the wife had no standing to sue when her husband or child was negligently injured.[5] Despite obvious changes in the social, economic and legal status of women, the action for lost consortium retained most of its common law attributes until 1950.[6]

In that year, the United States Court of Appeals for the District of Columbia, in *Hitaffer v. Argonne Co.*,[7] became the first federal tribunal to unequivocally recognize a wife's right to assert an action for lost consortium. In *Hitaffer*, the plaintiff's husband was negligently injured while in the employment of the defendant.[8] The court, operating in a legal environment that had totally rejected the notion that a wife could sue for consortium, analyzed precedents from around the country and found the notion wanting in logic. The primary arguments against such an action were that: (1) the wife has no right as such to the husband's services, although the husband has always had a legal right to the wife's services; (2) the Emancipation Act gave the wife a right to the fruits of her own services and consequently, placed the husband in the

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and could join his wife in the action. WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 428-30 (1926); *see* W. PAGE KEETON ET AL., HANDBOOK OF THE LAW OF TORTS § 125, at 931 (5th ed. 1984). *See generally* O. Kahn-Freund, *Inconsistencies and Injustices in the Law of Husband and Wife*, 15 MOD. L. REV. 133 (1952).

[5] HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 11.2-.3, at 385, 391 (2d ed. 1988).

[6] The early common law formulation of loss of consortium was borrowed from the much earlier Roman theory that the patriarch governed the household. Early English jurists applied this family law theory first to master-servant relationships to enable masters to recover for injury to servants. The theory was subsequently applied to familial relations to protect the husband's interest in the services of his wife and children. Recovery was subsequently extended to include damages to society, fellowship and affectionate relations. KEETON ET AL., *supra* note 4, at 931; *see also* Ridgeway, *supra* note 3, at 349.

[7] 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), *overruled on other grounds by* Smitherand Co. v. Coles, 242 F.2d 220 (D.C. Cir. 1957). The *Hitaffer* court was not the first to actually recognize a wife's right to recover for loss of consortium. The Supreme Court of North Carolina had allowed a wife to recover for loss of her husband's consortium in Hipp v. E.I. Dupont de Nemours & Co., 108 S.E. 318 (N.C. 1921). Most jurisdictions which previously refused to recognize the wife's action adopted the *Hitaffer* opinion.

[8] *Hitaffer*, 183 F.2d at 812.

same position as the wife so that neither may bring an action for consortium; (3) in negligence actions the purpose of damages is to compensate the injured person for the direct consequences of the wrong (the injury to the wife is indirect and thus not compensable); (4) a wife's injury is too remote and inconsequential to be measured; (5) the common law recognized no cause of action for the sentimental elements of consortium; (6) the action for consortium has never been allowed where there was not some showing of loss of services and a wife is unable to show such a loss; (7) double recovery of damages would result; and (8) the number of law suits would increase significantly.[9] The court, rather than engaging in legal gymnastics used in previous cases, relied heavily on the marital relationship to justify the wife's right of action. Judge Clark, writing for the majority, observed that:

> The actual injury to the wife from loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and wife as wife. *Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right arising out of the marriage relation.* . . . As the wrongs of the wife are the same in principle, and are caused by acts of the same nature, as those of the husband, the remedy should be the same.[10]

The holding in *Hitaffer* was initially rejected by a number of other courts. However, uniform condemnation of the old common law rule by legal scholars and commentators assisted in increasing the acceptance of the *Hitaffer* court's conclu-

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[9] *Id.* at 813-15.

[10] *Id.* at 816 (alteration in original) (quoting Bennett v. Bennett, 23 N.E. 17, 18-19 (N.Y. 1889)).

sion.[11] By 1958, the trend of recognition had begun. Today, the vast majority of jurisdictions allow loss of consortium actions to be instituted by either spouse.[12] Six jurisdictions have achieved equality between the spouses by abolishing consortium actions altogether.[13]

The development of the law in regard to interferences with the parent-child relationship parallels the development of actions for interference with the spousal relationship. Early common law recognized only the right of the father to recover damages for loss of his child's services. This right, like its spousal counterpart, was based upon the master-servant theory which entitled the father to compensation for the loss of the child's services.[14] The master-servant theory is still reflected in loss of consortium actions. Thus, where a parent seeks recovery for injury to his child, the law uniformly permits recovery for the loss of the child's fictional services or earnings.[15]

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[11] Law review articles and legal comments almost unanimously favored recovery by the wife. *See, e.g.*, 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 8.9 (1956); WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 119 (3d ed. 1964); G.H.L. Fridman, *Consortium as an "Interest" in the Law of Torts*, 32 CAN. B. REV. 1065, 1073-80 (1954); Holbrook, *supra* note 3; Joseph J. Simeone, *The Wife's Action for Loss of Consortium—Progress or No?*, 4 ST. LOUIS U. L.J. 424, 431-41 (1957).

[12] The wife's right to recover for loss of consortium is recognized in 44 states and the District of Columbia. For a list of states recognizing the wife's right, see Mogill, *supra* note 3, at 1333 n.68.

[13] For a list of the six jurisdictions that deny this action see Mogill, *supra* note 3, at 1334 n.69.

[14] G.A. Owens, *Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?*, 3 MONASH U. L. REV. 41, 45 (1976). In Guy v. Livesey, 79 Eng. Rep. 428 (K.B. 1619), a court, for the first time, observed the analogy between husband and wife and master and servant. In that case the plaintiff sued the defendant for the battery of himself and for the battery of his wife, who had went with the defendant and lived in a "suspicious manner." *Guy*, 79 Eng. Rep. at 428. The court held that the plaintiff did not have an action for battery to his wife. However, the court observed

> that the action was well brought; for the action is not brought in respect of the harm done to the wife, but is brought for the particular loss of the husband, for that he lost the company of his wife, . . . for which he shall have this action, as the *master shall have for the loss of his servant's service.*

Id. (emphasis added); *see also supra* note 4; *infra* note 15.

[15] The theory of loss of services was first endorsed by American courts around

By 1970, consortium began to take on a different gloss. Society began asking courts whether consortium actions should be expanded to protect parental interest in a child's society and companionship. Initially, courts, in the absence of statutory law,[16] were most reluctant to reevaluate the principles underlying the law of consortium to allow either parents or children to recover for the loss of companionship, society, and affection of their negligently injured loved one.

In 1975, Wisconsin became the first jurisdiction to effectuate a change in its common law to recognize the right of a parent to recover for loss of an injured child's companionship and society.[17] In *Shockley v. Prier*,[18] the Wisconsin Supreme

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the turn of the century. Loss of services became a technical requirement of an action for consortium. The loss of services theory is from a practical perspective obsolete because modern minor children have little, if any, service value or present earning capacity. Children today are valued wholly for sentimental reasons, not for their earnings and labor. Lost service still exists as an acknowledged fiction of the modern law of lost consortium. "Nevertheless, the 'modern' loss of services action is no different than the early loss of service action, and the majority of jurisdictions continues to limit the damages a parent may recover to those for loss of a child's services." Ridgeway, *supra* note 3, at 363-64; *see also* Mogill, *supra* note 3, at 1328.

Courts throughout the country have muddled the concepts of services, society, companionship and affection into a mass of confusion. The term "services" has over time acquired a meaning synonymous with society and companionship. Consequently, the majority view is clearly that loss of society and companionship as well as services are recoverable where a child has been tortiously injured. *See infra* note 24. The confusion is not, however, as great as it may seem because all courts, regardless of the language used, evaluate the same factors as proof of loss of consortium.

[16] Washington had a statute, and Iowa promulgated a rule of procedure, that allowed for the recovery of lost companionship and society. *See* WASH. REV. CODE ANN. § 4.24.010 (West 1988); IOWA R. CIV. P. 8; *cf.* Hayward v. Yost, 242 P.2d 971, 977 (Idaho 1952) (construing §§ 5-310 to -311 of Idaho Code to allow parents to recover for loss of child's society and companionship).

[17] Several jurisdictions addressed the issue and declined to create a cause of action for loss of a child's society and companionship prior to 1975. *See* Smith v. Richardson, 171 So. 2d 96 (Ala. 1965); Butler v. Chrestman, 264 So. 2d 812 (Miss. 1972); Ekalo v. Constructive Serv. Corp., 215 A.2d 1 (N.J. 1965); Gilbert v. Santon Brewery, 67 N.E.2d 155 (N.Y. 1946); Kalsow v. Grob, 237 N.W. 848 (N.D. 1931), *overruled by* Hopkins v. McBane, 427 N.W.2d 85 (N.D. 1988); Quinn v. City of Pittsburg, 90 A. 353 (Pa. 1914); McGarr v. National & Providence Worsted Mills, 53 A. 320 (R.I. 1902).

[18] 225 N.W.2d 495 (Wis. 1975).

Court was confronted with the issue of whether the parents of Paul Shockley, a minor allegedly injured by the negligence of two physicians, could recover for loss of Paul's aid, comfort, society and companionship during the minority of the child.[19]

Justice Day, writing for the majority, observed that courts were obligated to make changes in the law "if the common-law rule no longer fits the social realities of the present day."[20] Children, Justice Day noted, rather than being the economic asset of past decades, were usually sources of great expenditures.[21] Consequently, the injury sustained by parents upon the death or injury of a child is not primarily economic. Rather, "[s]ociety and companionship between parents and their children are closer to our present day family ideal than the right of the parents to the 'earning capacity during minority,' which once seemed so important when the common law was originally established."[22] As the law currently stands in a majority of jurisdictions, parents may recover only for additional expenses incurred in caring for the child and for any loss of the child's services;[23] some courts, however, also allow parents to recover for the tortiously caused loss of a nonfatally injured child's society, companionship and affection.[24] Ingenious lawyers, en-

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[19] *Shockley*, 225 N.W.2d at 496-97.

[20] *Id.* at 497.

[21] *Id.* at 498.

[22] *Id.* at 499.

[23] 59 AM. JUR. 2D *Parent and Child* §§ 103-06 (1987); *see also* Mark L. Johnson, Note, *Compensating Parents for the Loss of their Nonfatally Injured Child's Society; Extending the Notion of Consortium to the Filial Relationship*, 1989 U. ILL. L. REV. 761, 763-64.

[24] *See, e.g.*, Frank v. Superior Ct. of Ariz., 722 P.2d 955, 956 (Ariz. 1986); Yordeo v. Savage, 279 So. 2d 844, 845 (Fla. 1973); Masaki v. General Motors Corp., 780 P.2d 566, 577 (Haw. 1989); Hayward v. Yost, 242 P.2d 971, 976 (Idaho 1952); Handeland v. Brown, 216 N.W.2d 574, 579 (Iowa 1974); Lee v. USAA Casualty Ins. Co., 540 So. 2d 1083, 1090 (La. Ct. App. 1989); Davis v. Elizabeth Gen. Medical Ctr., 548 A.2d 528, 528-30 (N.J. Super. Ct. Law Div. 1988); First Trust Co. v. Scheels Hardware & Sports, 429 N.W.2d 5, 9-11 (N.D. 1988); Gallimore v. Children's Hosp. Medical Ctr., 617 N.E.2d 1052, 1053-55 (Ohio 1993); Jannette v. Duprez, 701 S.W.2d 56, 61 (Tex. Ct. App. 1985); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 492-93 (Wash. 1983); Shockley v. Prier, 225 N.W.2d 495, 499-500 (Wis. 1975). While the Texas court in *Jannette v. Duprez* recognized a parent's right to recover for loss of consortium of a nonfatally injured child, the

couraged by *Hitaffer* and *Shockley*, sought further expansion of the law of consortium to protect the legal interest of children of negligently injured parents. Judicial response to expansion was initially discouraging despite the fact that children possessed rights and interests commensurate with parents in the familial relationship. Consequently, in the first wave of cases to address this issue, courts all over the country uniformly rejected the notion that a child could recover for loss of companionship, affection and aid of a negligently injured parent.[25]

In refusing to allow the action for parental consortium, courts have found that compensation for the loss or injury to children was often included in the damages award the tortfeasor was required to pay the injured parent as a direct result of the personal invasion. Consequently, there existed a substantial likelihood of double recovery for the same injury.[26]

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court limited that right of recovery only to instances when the parent actually witnessed the child's injury. *Jannette*, 701 S.W.2d at 58.

[25] *See* Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D.C. Cir. 1958); Jeune v. Del E. Webb Constr. Co., 269 P.2d 723, 724 (Ariz. 1954), *overruled by* Villareal v. Arizona Dep't of Transp., 774 P.2d 213 (Ariz. 1988); Borer v. American Airlines, Inc., 563 P.2d 858, 866 (Cal. 1977); Zorzos v. Rosen, 467 So. 2d 305, 308 (Fla. 1985); Clark v. Suncoast Hosp., Inc., 338 So. 2d 1117, 1119 (Fla. Dist. Ct. App. 1976); Halberg v. Young, 41 Haw. 634, 647 (1957); Hankins v. Derby, 211 N.W.2d 581, 585-86 (Iowa 1973), *overruled by* Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Mueller v. Hellrung Constr. Co., 437 N.E.2d 789, 792 (Ill. 1982); Hoffman v. Dantel, 368 P.2d 57, 59-60 (Kan. 1962); Kelly v. United States Fidelity & Guar. Co., 353 So. 2d 349, 351 (La. Ct. App. 1977); Durepo v. Fishman, 533 A.2d 264, 265 (Me. 1987); Gaver v. Harrant, 557 A.2d 210, 218 (Md. 1989); Miller v. Monsen, 37 N.W.2d 543, 545-46 (Minn. 1949); Powell v. American Motors Corp., 834 S.W.2d 184, 191 (Mo. 1992); Guenther v. Stollberg, 495 N.W.2d 286, 289 (Neb. 1993); General Elec. Co. v. Bush, 498 P.2d 366, 371 (Nev. 1972); Russell v. Salem Transp. Co., 295 A.2d 862, 864 (N.J. 1972); Wilson v. Galt, 668 P.2d 1104, 1112 (N.M. Ct. App.), *cert. quashed*, 668 P.2d 308 (N.M. 1983); DeAngelis v. Lutheran Medical Ctr., 449 N.E.2d 406, 407 (N.Y. 1983); Vaughn v. Clarkson, 376 S.E.2d 236, 237 (N.C. 1989); Morgel v. Winger, 290 N.W.2d 266, 267 (N.D. 1980); High v. Howard, 592 N.E.2d 818, 820 (Ohio 1992), *overruled by* Gallimore v. Children Hosp. Medical Ctr., 617 N.E.2d 1052 (Ohio 1993); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 332-33 (Or. 1982); Steiner v. Bell Tel. Co., 517 A.2d 1348, 1354-55 (Pa. Super. Ct. 1986), *aff'd*, 540 A.2d 266 (Pa. 1988); Erhardt v. Havens, Inc., 330 P.2d 1010, 1012 (Wash. 1958), *overruled in part by* Ueland v. Reynolds Metal Co., 691 P.2d 190 (Wash. 1984).

[26] *See supra* note 25; *see also* Robert J. Cooney & Keven J. Conway, *The*

Courts also articulated the difficulty of measuring damages suffered by a child for loss of such intangibles as love, affection and attention. Some of these difficulties included: administrative concern for the likelihood of increased litigation; a child's historical lack of entitlement to his parents' society and services; and lack of precedence as factors which counsel against recognition of such a cause of action.[27]

Continued efforts slowly eroded many of the traditional arguments relied upon for denial of parental consortium. In response, many courts launched a final defensive against recognition of the action for parental consortium. Many jurists asserted the view that the debate over parental consortium was one for the legislature to resolve, and, in the absence of a statute, no action for parental consortium would lie.[28] State legislatures have all but expressly rejected the judicial invitation to legislate in this area.[29]

State legislatures, however, have uniformly recognized the right of children to recover damages caused by the wrongful killing of a parent. Wrongful death statutes typically provide that, in all cases in which the decedent, had he lived, would have had a cause of action against the tortfeasor, certain named beneficiaries could sue in their own name and receive such damages as resulted from the decedent's demise. Damages which are ordinarily recoverable under wrongful death statutes include: (1) the pecuniary loss sustained by survivors with reference to the probable earnings of the decedent in view of

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Child's Right to Parental Consortium, 14 T. MARSHALL L. REV. 341, 342-51 (1981); Mogill, *supra* note 3, at 1379.

[27] *See supra* note 26; *see also* Annotation, *Child's Action—Loss of Parental Attention*, 11 A.L.R. 4TH 549 (1982); Allan E. Korpela, Annotation, *Child's Right of Action for Loss of Support, Training, Parental Affection, or the Like, Against a Third Person Negligently Injuring Parent*, 69 A.L.R. 3D 528 (1976).

[28] *See, e.g.*, Gray v. Suggs, 728 S.W.2d 148, 149 (Ark. 1987) (holding that creation of cause of action was for legislature); Nix v. Preformed Line Prod., 216 Cal. Rptr. 581, 584-85 (Cal. Ct. App. 1985) (declining to recognize cause of action); Zorzos v. Rosen, 467 So. 2d 305, 307 (Fla. 1985) (recognizing legislatively created cause of action for parental consortium). For additional discussion, see *infra* note 37.

[29] *See infra* note 38 and accompanying text (noting that only two states have legislatively adopted cause of action).

his age, health, livelihood and experience; (2) loss of the decedent's care, society and attention; and (3) an additional monetary award deemed fair and just by way of solace and comfort for the sorrow, suffering and mental anguish caused his survivor.[30] Several courts have asserted that wrongful death statutes are manifestations of legislative intent to limit a child's right to recover for injury to a parent. The utilization of wrongful death statutes and deference to the legislature as persuasive evidence against lost consortium, however, are contrary to the historical precepts of the common law process. Consequently, undaunted by the lack of judicial response, legal scholars and practitioners alike continued in the struggle to gain judicial recognition of the action for parental consortium.[31]

The first major inroad came in 1980 in the case of *Ferriter v. Daniel O'Connell's Sons, Inc.*[32] Therein, the Massachusetts Supreme Court became the first tribunal to recognize a common law action for loss of parental consortium.[33] Since then, a significant number of jurisdictions have followed Massachusetts' lead and recognized the action.[34] Though legal

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[30] KEETON ET AL., *supra* note 4, § 127, at 951-52.

[31] *See* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181 (1916). As early as 1916, Dean Pound criticized the common law's failure to protect the familial rights of children. Pound observed:

> As against the world at large a child has an interest . . . in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. . . . It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand.

Id. at 185-86. Dean Prosser also joined in this cause, observing that "[i]t is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 896 (Jesse H. Choper et al. ed. 1971); *see also* CLARK, *supra* note 5, § 12.4, at 670-71; Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 595-615 (1976); KEETON ET AL., *supra* note 4, at 924.

[32] 413 N.E.2d 690 (Mass. 1980).

[33] *Ferriter*, 413 N.E.2d at 703.

[34] Several states currently judicially recognize a cause of action for parental

commentaries and periodicals continue to assert that a *substantial* number of jurisdictions still deny the action,[35] this statement is slightly inaccurate because it does not reflect the fact that of the thirty-eight jurisdictions which have addressed the issue, fifteen[36] recognize the cause of action. Among these fifteen jurisdictions are six jurisdictions that have reversed previous positions denying the existence of the tort of loss of parental consortium.[37] In addition, two state legislatures have changed the common law of their jurisdictions statutorily,[38]

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consortium. *See* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994-97 (Alaska 1987); Villareal v. Arizona Dep't of Transp., 774 P.2d 213, 216-20 (Ariz. 1989); Weitl v. Moes, 311 N.W.2d 259, 261-73 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 151-53 (Iowa 1983); Berger v. Weber, 303 N.W.2d 424, 425 (Mich. 1981); Keele v. St. Vincent Hops. & Health Care Ctr., 852 P.2d 574, 576-78 (Mont. 1993); Williams v. Hook, 804 P.2d 1131, 1133-38 (Okla. 1990); Reagan v. Vaughn, 804 S.W.2d 463, 465-66 (Tex. 1990); Hay v. Medical Ctr. Hosp., 496 A.2d 939, 946 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830, 841 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513, 522 (Wis. 1984); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990); *see also* Reighley v. International Playtex, Inc., 604 F. Supp. 1078, 1083-84 (D.C. Colo. 1985) (construing Colorado state law). Additionally, two states have statutorily changed their common law positions. *See* FLA. STAT. ANN. § 768.0415 (West Supp. 1994); LA. CIV. CODE ANN. art. 2315 (West Supp. 1994).

[35] *See, e.g.*, Ridgeway, *supra* note 3, at 349; *Child's Action—Loss of Parental Attention*, *supra* note 27, at 552; Korpela, *supra* note 27, at 530-31. The majority view provides that "[o]ne who by reason of his tortious conduct is liable to a parent for illness or other bodily harm is not liable to a minor child for resulting loss of parental support and care." RESTATEMENT (SECOND) OF TORTS § 707A (1977).

[36] *See supra* note 34.

[37] *See supra* note 25.

[38] Section 768.0415 of the Florida Statutes Annotated provides that "[a] person who, through negligence, causes significant permanent injury to the natural or adoptive parent of an unmarried dependent resulting in a permanent total disability shall be liable to the dependent for damages, including damages for permanent loss of services, comfort, companionship, and society." FLA. STAT. ANN. § 768.0415 (West Supp. 1994); *see also* United States v. Dempsey, 635 So. 2d 961, 962-65 (Fla. 1994) (construing statute to protect consortium interest of parent in child and to provide for elements of damage in action brought by parent for injury to child). Similarly, the Louisiana Civil Code states:

> Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. Damages may include loss of

thus bringing the number of jurisdictions protecting the child's interest to seventeen of thirty-eight. Furthermore, the vast majority of jurisdictions that deny the action recognize the undeniability of the fact that:

> It is common knowledge that a parent who suffers serious physical or mental injury is unable to give his minor children the parental care, training, love and companionship in the same degree as he might have but for the injury. Hence, it is difficult for the court, on the basis of natural justice, to reach the conclusion that this type of action will not lie. Human tendencies and sympathies suggest otherwise. Normal home life for a child consists of complex incidences in which the sums constitute a nurturing environment. When the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one can seriously contend otherwise.[39]

Similar sentiments were articulated in California, a jurisdiction which denies the action. The California Supreme Court in the case of *Borer v. American Airlines, Inc.*[40] observed:

> Plaintiff's claim, viewed in the abstract and divorced from its surroundings, carries both logical and sympathetic appeal . . . . Certain aspects of [the] spousal relationship are similar to those of the parent-child relationship, and there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parent.[41]

> consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

LA. CIV. CODE ANN. art. 2315 (West Supp. 1994). Louisiana courts have yet to construe this statute as giving rise to an action for parental consortium. The statute certainly suggests by way of implication, however, that a child can bring an action for loss of consortium.

[39] *See* Still v. Baptist Hosp., Inc., 755 S.W.2d 807, 812 (Tenn. Ct. App. 1988) (quoting Theama v. City of Kenosha, 344 N.W.2d 513, 516 (Wis. 1984)); *see also*, Susan J.G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 COOLEY L. REV. 273, 274-78 (1991).

[40] 563 P.2d 858 (Cal. 1977).

[41] *Borer*, 563 P.2d at 862 (quoting Suter v. Leonard, 45 Cal. App. 3d 744, 746

The law of consortium is firmly entrenched in the common law. The preceding observations, however, demonstrate that contemporary courts are slowly coming to grips with the fact that the original underpinnings of the law of consortium have all but withered away. Consequently, a substantial likelihood exists that courts which address this issue in the future will be influenced by the relational interests of children in a modern society. The existence of the action for parental consortium can no longer be questioned. Rather, what remains is for courts to identify the ideas and policies that will influence the development of substantive rules and remedies for violation of this new substantive right.

B. Policy Considerations

The issue of whether a child has a substantive claim for the negligent injury of a parent cannot be severed or considered in isolation from that of which remedy is most appropriate for the protection of that claim. Remedy is significant because this concept encompasses the means for achieving or carrying out the policy envisioned by the recognition of the substantive right. Courts, as nearly as possible, seek to maintain a careful and delicate balance between substantive rights and corresponding remedies. Ideally, a remedy should be neither narrower nor broader than the substantive right that invokes it.[42] The congruence between rights and remedies is important both in the selection of a remedy and in its measurements. Thus, it has been observed:

> The idea that remedies and substance must match presents many of the challenges of remedial law, but the idea is not an absolute one. It is qualified, sometimes quite substantially, by the further idea that remedies must be capable of practical administration and reasonable measurement. . . . Just as the remedy is to be selected and measured to carry out the sub-

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(1975)).

[42] DAN B. DOBBS, REMEDIES: DAMAGES-EQUITY-RESTITUTION § 1.2, at 3 (Jesse H. Choper et al. ed., 1973).

> stantive goals, the substantive rules should be formulated with the possible remedies in mind.[43]

The remedy most appropriate for interference with a child's substantive right to parental consortium is damages. Nevertheless, courts that have refused to recognize the action have criticized the effectiveness of a monetary award to the child.[44] The essence of the criticism is best illustrated by the following, frequently cited passage:

> Loss of consortium is an intangible, nonpecuniary loss; monetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women. To say that plaintiff has been "compensated" for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained instead, a future benefit essentially unrelated to that loss.[45]

The logic underlying this observation is dubious. The practical counter response is that compensation or monetary damages is the only manageable way our system of jurisprudence has found to ease personal loss—pecuniary and nonpecuniary. Furthermore, compensation, especially where a cognizable loss has occurred, is clearly preferable to denying recovery.

This line of criticism developed and persists because the policy considerations which underlie loss of parental consortium have never been clearly articulated. As noted earlier, even courts that refuse to recognize loss of parental consortium actions appreciate the fact that a genuine injury is inflicted upon the child as a result of the defendant's negligent conduct.[46] It is no longer doubted that children are persons with legal rights

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[43] *Id.* § 1.2, at 4-5.

[44] Hoesing v. Sears, Roebuck & Co., 484 F. Supp. 478, 479 (D. Neb. 1980); *Borer*, 563 P.2d at 862.

[45] *Borer*, 563 P.2d at 862. For counterargument from jurisdictions recognizing parental consortium, see *infra* note 104.

[46] *See supra* notes 39, 41.

and entitlements. Likewise, it is beyond dispute that minor children have an interest in the familial relationship that is as important, if not more so, than that of husband and wife. These truths, combined with the legal protection common law courts have historically accorded other familial interests, suggest that the child's interest in consortium is legitimate.[47]

Common law courts have traditionally expressed reluctance to recognize a new substantive action only where the asserted action does not fit precisely within a traditional analytical framework. For example, where a new substantive right such as parental consortium is asserted, common law courts, more frequently than not, look to the underlying theory of culpability to determine the merits of the assertion. In the context of parental consortium the underlying theory of culpability is negligence. Consequently, the initial inquiry is whether the substantive claim for parental consortium defies traditional negligence analysis.

The traditional negligence analysis requires proof of duty, breach, proximate cause and damages. The legal concepts of duty and proximate cause are, however, most often cited as the factors limiting the development of new substantive tort claims. While duty and proximate cause are often treated as distinct analytical inquiries, such is not always the case.[48] "[D]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[49] The same policy concerns and considerations which are examined in the context of whether a duty is owed are more often than not duplicated in the proximate cause inquiry. The significant distinction between duty and proximate cause is the role each concept plays in the analysis of a negligence action. The duty inquiry is traditionally utilized to determine whether a rela-

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[47] *See* Ralph S. Petrilli, *A Child's Right to Collect for Parental Consortium Where Parent is Seriously Injured*, 26 J. FAM. L. 317, 319-20, 346-47 (1987-88); *see also* Johnson, *supra* note 23, at 774-75.

[48] *See* KEETON ET AL., *supra* note 4, § 42, at 273.

[49] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 331-34 (3d ed. 1964).

tionship exists that imposes upon the defendant a legal obligation for the benefit of the plaintiff.[50] Proximate cause, on the other hand, is concerned with confining the defendant's liability to a reasonable limit.[51]

Parental consortium is consistent with the traditional negligence analysis. It does not strain the concept of proximate cause to say that a negligent tortfeasor should foresee harm to children resulting from permanent injury to a parent. This fact has never been questioned. What then has caused courts such grave concerns with regards to parental consortium claims?

Judicial attempts to balance the congruence between rights and remedies can lead to unexplainable results. Courts that have entertained the issue and denied recovery have all based their decisions on administrative and remedial concerns. Such reasoning is analogous to the brain teaser, "which came first, the chicken or the egg?" In essence, courts that have denied recovery have utilized the means (the difficulty of fashioning a remedy) to defeat the ends (the recognition of a legitimate substantive interest).

Whether to recognize a new common law substantive claim has traditionally been determined by ascertaining whether the complaining person has an interest "entitled to" and "capable of" legal protection. As discussed above, children are persons with a legal interest in the familial relationship. That interest is consistent with traditional negligence analysis. Administrative and remedial concerns should not determine whether a new common law substantive action should be recognized. Rather, these concerns should be addressed in and incorporated into that part of the common law process which concerns itself with fashioning the prima facie requirements, the measure of damages, and limitations to recovery. To illustrate, the rule that a child can assert a parental consortium claim only where the parent has suffered severe, serious, and permanent injury acts as a limitation which diminishes both administrative and

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[50] KEETON ET AL., *supra* note 4, § 53, at 356.
[51] *Id.*

remedial concerns. This rule has been adopted by a substantial number of the jurisdictions which recognize claims for loss of parental consortium. This rule also demonstrates that the proper place for administrative and remedial concerns is not in an inquiry dealing with whether to recognize a new substantive common law right, but rather in fashioning the prima facie requirements and other judicial limitations to the action. What remains, however, is to demonstrate that interference with a child's interest in parental consortium leads to both real and significant harm not only to the relationship, but also to the child.

As noted earlier, the vast majority of jurisdictions which deny the existence of the substantive right to parental consortium recognize that actual harm results from the negligent injury of the parent. A close examination of these cases, however, suggests that the harm referred to is harm to the relationship as contrasted with harm to the child.[52] The reality is that children often suffer mentally and emotionally where there has been serious and permanent injury to the parent. The harm done to a child where a parent, due to the negligence of the defendant, is totally and permanently paralyzed, is probably as great as where the parent is killed.

The major policy consideration underlying tort law is the compensation of wrongfully injured persons. The common law commitment to this policy is strong and is manifested in the number of exceptions to the traditional tort analysis recognized by common law courts.[53] Public policy, though articulated by jurists and legislators, is considered to be the

> [c]ommunity common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like; it is that general and well-settled public opinion relating to man's plain, palpable

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[52] *See supra* notes 39, 41 and accompanying text.

[53] Two of the most well known common law exceptions to the traditional negligence analysis are res ipsa loquitur and the rule of *Summers v. Tice*. Both developed out of public policy concerns that many wrongfully injured persons would go uncompensated if adjustment in the law were not made.

> duty to [mankind], having due regard to all circumstances of each particular relation and situation.[54]

The policy considerations underlying loss of parental consortium are bolstered by the high priority given to the idea of the traditional family. Though historically male dominated and biased, the idea of the traditional family has influenced the development of the vast majority of civic institutions whether social, political or religious.

Most people who have children hope to enjoy the experience of raising a child in a normal happy relationship, which will result in a bond existing throughout their lives. The pros and cons of parenthood have been the subject of countless articles and books. The psychological joys derived from this experience are believed to surpass any other.[55] One renowned psychologist stated that "most Americans think of their families as the most important things in their lives," and that Americans derive much of their pleasure from their families.[56] For many Americans who have decided to commit their finances, time and emotions to parenthood, the loss of the opportunity to enjoy a normal experience is a devastating blow. Children, who are the intended and direct beneficiaries of a healthy parenting experience, are expected to return to the parents the fruits of their parents' labor when mom and dad are old. Consequently, if the parenting process is culpably disturbed, the probability of harm to all is extremely likely.

This article will explore the contours of the cause of action for parental consortium. It is intended to create awareness and give direction. Section A examines the issue of who can be a plaintiff in a loss of parental consortium action. Section B discusses the nature and quality, both temporary and permanent, of the injury necessary to support the action. This section also

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[54] BLACK'S LAW DICTIONARY 1231 (6th ed. 1990).

[55] *See* LOUIS GENEVIE & EVA MARGOLIES, THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS 55-69 (1987).

[56] Patrick Reardon, *Top Threat to Family: No Time For the Kids*, CHICAGO TRIBUNE, Oct. 10, 1989, § 1, at 1 (quoting Dr. Lee Salk, nationally recognized child and family psychologist).

examines the derivative nature of loss of consortium and the effect of an injured parent's contributory negligence on the child's claim. Section C scrutinizes the various methods of assessing damages in a loss of parental consortium action. This section concludes that many of the rules for assessing damages may be borrowed from other substantive areas of the law such as wrongful death and spousal consortium. Section D attempts to illustrate the various prima facie case requirements which have developed in response to the view taken by courts of the substantive rules articulated in Sections A, B, and C. Finally, Section E observes that further attempts to expand the law of consortium to protect filial relationships other than the marital relationship, are inevitable.

II. PARENTAL CONSORTIUM

A. Plaintiffs

The issue of who can be a plaintiff in a parental consortium action has a standard answer. Because dependent minor children are the group most likely to suffer real harm due to the disruption of the parent-child relationship, all jurisdictions agree that a claim can be asserted on behalf of these parties.[57] Several jurisdictions, such as Arizona,[58] Texas,[59] Washington,[60] and Iowa,[61] do not limit the action solely to minor children. These jurisdictions, while recognizing that minors are the group most likely to suffer real and severe injury due to the disruption of the parent-child relationship, leave the issue of whether children other than minors have standing to sue to the jury in fixing damages.[62] In essence, when the plaintiff is an

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[57] *See supra* note 31; *see also* ALASKA PATTERN CIVIL JURY INSTRUCTION 20.09 cmt. (1990) ("[M]inor children have a cause of action for loss of parental consortium. Whether such a cause of action exists for non-minors is an open question, although the *Hibpshman* court referred to case law restricting the cause of action to minors. . . .") (citations omitted).

[58] Villareal v. State Dep't of Transp., 774 P.2d 213, 220 (Ariz. 1989).

[59] Reagan v. Vaughn, 804 S.W.2d 463, 466 (Tex. 1990).

[60] Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984).

[61] Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 152 (Iowa 1983).

[62] *See, e.g., Reagan*, 804 S.W.2d at 466; *Ueland*, 691 P.2d at 195. The ratio-

emancipated adult child, the trier of fact can consider the nature of the relationship between the child and injured parent in determining the award. The standing rule followed in a given jurisdiction will also affect the measure of damages in parental consortium actions.[63]

Some, but not all, jurisdictions have concluded that, in addition to minor children, handicapped[64] or incapacitated[65] children also qualify as plaintiffs. The further delineation of "minor children" into distinct groups suggests that courts are genuinely seeking to protect the essential elements of the parent-child relationship. Those elements are the children's need for parental care, love, companionship and support. The delineations also have in common the element of dependency. Therefore, in the vast number of jurisdictions that recognize the action, any child, other than an adult emancipated child, who is primarily dependent on the parent for love, care and support, can be a plaintiff. It is essential that dependency be rooted not only in the economic needs but also in emotional and psychological requirements of the child.[66] A minor child who does not live in the home is not automatically barred from bringing suit for parental consortium.[67] Rather, where the child is not in the home, the trier of fact must be presented with evidence of the filial relationship and of needs that are not met due to the injury to the parent.[68]

Relatives other than children of "adoptive or natural parents"[69] are not entitled to assert a claim for parental consor-

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nale behind this view is that adult children are allowed to recover under both the Texas and Washington wrongful death statutes. *Reagan*, 804 S.W.2d at 466; *Ueland*, 691 P.2d at 195.

[63] *See infra* note 130 and accompanying text.

[64] *See, e.g.*, Belcher v. Goins, 400 S.E.2d 830, 841 (W. Va. 1990) (dependency on parent is controlling factor in determining standing).

[65] *See, e.g.*, Williams v. Hook, 804 P.2d 1131, 1138 (Okla. 1990).

[66] Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696 (Mass. 1980).

[67] Barbosa v. Hopper Feeds, Inc., 537 N.E.2d 99, 104 (Mass. 1989).

[68] *Barbosa*, 537 N.E.2d at 104-05.

[69] In *Villareal*, the court observed, "A proper plaintiff is a child whose parent has been injured. We limit our definition of parent to include biological and adoptive parents." Villareal v. Arizona Dep't of Transp., 774 P.2d 213, 219 (Ariz. 1989). This definition is consistent with the law of other jurisdictions recognizing

tium. As Justice Gonzalez observed in *Reagan v. Vaughn*:[70]

> The distinction between the interests of children and those of other relatives is rational and easily applied. Most children are dependent on their parents for emotional sustenance. This is rarely the case with more remote relatives. Thus, by limiting the plaintiffs in the consortium action to the victim's children, the courts would ensure that the losses compensated would be both real and severe.[71]

The issue of who can be a plaintiff in a loss of parental consortium action is initially determined by examining whether a parent-child relationship exists. Thereafter, dependency, which encompasses the economic, emotional and psychological needs of the child, becomes the primary factor in determining whether the victim's child has a cause of action[72] and in calculating the amount of recovery in that action.[73]

This analytical framework is useful in determining novel questions such as whether illegitimate children, step-children, foster children or fetuses have a right of action for parental consortium. The logical answer, at least with regard to illegitimate children who are involved in a dependent, filial relationship with the natural parent, should be in the affirmative.

Step-children and foster children, for policy reasons, may engender recognition of a special exception to this analytical framework. Such an exception would be analogous to the rule in *Dillon v. Legg*,[74] which allows a bystander in relational

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loss of parental consortium. For a list of jurisdictions recognizing loss of parental consortium, see *supra* note 34. "Parent" does not include grandparent, siblings, other relatives or friends, and may not include a stepparent who has not adopted the child. 2 JACOB STEIN, STEIN ON PERSONAL INJURY DAMAGES § 13.20, at 178 (2d ed. 1991).

[70] 804 S.W.2d 463 (Tex. 1990).

[71] *Reagan*, 804 S.W.2d at 466 (quoting Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984)). This view is consistent with case law in each jurisdiction that recognizes the action.

[72] *See, e.g, Villareal*, 774 P.2d at 220; Belcher v. Goins, 400 S.E.2d 830, 842 (W. Va. 1990).

[73] *See, e.g., Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467; Ueland v. Reynolds Metals Co., 691 P.2d 190, 194-95 (Wash. 1984).

[74] 441 P.2d 912 (Cal. 1968).

proximity to the injured person to recover for emotional distress caused by witnessing the injury.[75] *Dillon* disavows the rule of law, once followed in a substantial majority of jurisdictions, which precluded bystanders from recovering for emotional distress unless they themselves were in the zone of danger.[76]

The *Dillon* court's rejection of the zone-of-danger rule was in part due to the overly restrictive effect of the test. By balancing physical proximity, relational proximity and temporal proximity, the court devised a standard which not only operated as a limitation to recovery but also as a guarantor of the genuineness of claims. This extended legal protection to include a larger number of genuine claims for emotional distress, which previously could not have been brought.

Relational proximity is certainly consistent with the policy considerations underlying loss of parental consortium. The major attraction of the relational proximity standard is its flexibility. It does not require the creation of an immutable rule precluding certain groups of children from asserting a cause of action. Rather, it embodies the philosophy that a child's standing to sue for loss of parental consortium should be determined on a case-by-case basis. This is much more attractive than a strict rule precluding step-children and foster children from asserting an action. Step-children and foster children should not be denied recovery; especially, where they can prove by a preponderance of the evidence the existence of a strong filial relationship and emotional and financial dependency upon the injured step or foster parent.

The development of the tort law of fetal protection—prenatal injury— has been slow and controversial. Prior to 1946, legal actions seeking compensation for prenatal injury were uniformly rejected.[77] That rejection focused on two reasons: (1) the defendant could owe no duty to a person not in

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[75] *Dillon*, 441 P.2d at 921.

[76] *Id.* at 915. This view has been adopted by the RESTATEMENT (SECOND) OF TORTS § 313 (1965).

[77] KEETON ET AL., *supra* note 4, § 55, at 367-68.

existence at the time of the injury; and (2) the difficulty of proving causal relationship was so tenuous that the danger of fictitious claims was too great.[78] Presently, every jurisdiction recognizes that a child injured inter-utero and born alive can maintain an action for prenatal injury, and if he dies as a result of such injuries after birth, an action will lie for wrongful death. Many jurisdictions, however, have limited the right to recover to cases where the child is viable or quick at the time of the injury.[79]

The rights of fetuses pose a particular problem in the context of loss of parental consortium since the emotional aspect of the parent-child relationship, which is the essence of a parental consortium claim, is obviously lacking. It can hardly be said that a fetus has an emotional attachment to the negligently injured parent. Likewise, the degree of fetal dependency on the injured parent for care, society and support is tenuous at best.

B. Nature of the Injury

The action for parental consortium contemplates a single tortious act which injures the parent and consequently the child by virtue of their relationship to each other. The injured parent sustains direct personal injuries for which he or she has the exclusive right to recover. The child suffers damages to emotional interests emanating from the parent-child relationship and has the right to bring an action for loss of parental consortium to recover for these damages.

Not only must there be an injury to a parent, but in a substantial number of jurisdictions, that injury must be compensable; that is, an injury for which the defendant is liable.[80] Accordingly, in Arizona, Montana, Texas, Washington, Wisconsin, West Virginia, and Vermont, the child's consortium claim is barred as a matter of law when the jury finds for the defendant on the injured parent's personal injury claim.[81] If the

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[78] *Id.*

[79] *Id.*

[80] *See, e.g., Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467; *Ueland*, 691 P.2d at 192.

[81] *See Villareal*, 774 P.2d at 220; Keele v. St. Vincent Hosp. & Health Care

injured parent's contributory negligence bars his or her recovery, it also bars the child's claim for lost parental consortium.[82] The same rule applies under the comparative negligence rule where the injured parent is precluded from recovering because his or her negligence was greater than that of the defendant.[83] Likewise, the injured parent's settlement or release of the action may operate to dislodge the child's action.[84]

The remaining jurisdictions which recognize the action, but have not expressly ruled on this issue, may or may not follow the common law as discussed above. These jurisdictions, Alaska, Iowa, Massachusetts, Michigan, Oklahoma, and Wyoming, may choose to follow the spousal consortium rule which prohibits reduction of the non-injured spouse's consortium award for the contributory negligence of the injured spouse.[85] Surprisingly, Iowa and Massachusetts, both jurisdictions which allow actions for loss of parental consortium, prohibit the reduction of spousal consortium awards for the contributory negligence of the injured spouse.[86] It would not be surprising for these states, along with others, to apply this rule to their common law of parental consortium. Conversely, Alaska, Oklahoma, and Wyoming view consortium as derivative and allow spousal consortium awards to be reduced by the contributory negligence of the injured spouse.[87] Our legal system's preoccupation with

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Ctr., 852 P.2d 574, 577 (Mont. 1993); *Reagan*, 804 S.W.2d at 467; Hay v. Medical Ctr. Hosp., 496 A.2d 939, 942-43 (Vt. 1985); *Ueland*, 691 P.2d at 192; *Belcher*, 400 S.E.2d at 841; *Theama*, 344 N.W.2d at 522.

[82] *Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467.

[83] *Villareal*, 774 P.2d at 220; *Reagan*, 804 S.W.2d at 467.

[84] *See, e.g.*, Belcher v. Goins, 400 S.E.2d 830, 842 (W. Va. 1990).

[85] *See* Hibpshman v. Prudhoe Bay Supply Inc., 734 P.2d 213, 213 (Alaska 1987); Weitl v. Moes, 311 N.W.2d 259, 259 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148 (Iowa 1983); Ferriter v. Daniel O'Connell's Sons Inc., 413 N.E.2d 690, 690 (Mass. 1980); Williams v. Hook, 804 P.2d 1131, 1131 (Okla. 1990); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1171 (Wyo. 1990).

[86] *See* Schwennen v. Abell, 430 N.W.2d 98, 101 (Iowa 1988); Handeland v. Brown, 216 N.W.2d 574, 579 (Iowa 1974); Morgan v. Lalaniere, 493 N.E.2d 206, 212 (Mass. App. Ct. 1986).

[87] *See* Eggert v. Working, 599 P.2d 1389, 1391 (Alaska 1979); McKee v. Neilson, 444 P.2d 194, 197 (Okla. 1968); Weaver v. Mitchell, 715 P.2d 1361, 1369

uniformity and certainty of law supports the conclusion that these jurisdictions will probably apply the same rule to parental consortium claims.

1. Derivative vs. Independent Claims

The different views existing in regard to "compensable injury" are the consequence of the dual nature of consortium claims. Consortium claims have historically been viewed as derivative since they are dependent on the injured spouse or parent having a valid cause of action. They are also generally considered to be separate and independent claims. Courts that view consortium claims as derivative adhere to the rule that they must stand or fall with the main claim.[88] As William Prosser explained:

> The conflict that appears to be developing in the cases, however, suggests the need for basic explanations, of which there has been something of a shortage. Courts have commonly said that the consortium action is derivative and must fall with the main claim, but as they could as well have said that it was independent, this sounds more like a conclusion than a reason, and indeed the courts which hold that the injured person's contributory negligence does not reduce damages in the consortium claim have said exactly that. But it must also be observed that the label "independent action" for the consortium claim is equally a conclusion. In the end the reasons for adopting one line of cases or another may turn less on logic than on perceptions of social needs and justice to the parties.[89]

The absence of a rational explanation for choosing either approach over the other suggests that courts have broad discretion in shaping this aspect of consortium. A major criticism of the derivative approach is its all-or-nothing nature. In states which still adhere to common law contributory negligence, the

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(Wyo. 1986).

[88] KEETON ET AL., *supra* note 4, § 125, at 938.

[89] *Id.* § 125, at 938-39.

child's claim completely terminates along with that of the injured parent. Thus, the tortfeasor receives a windfall and completely escapes the legal consequences of his tortious conduct. The abolition of common law contributory negligence and the adoption by a majority of states of some variant of comparative fault diminishes the frequency with which a complete forfeiture of the child's claim will occur. However, adherence to the derivative view will still cause a diminution in value of the child's claim. Consequently, the issue should be resolved by taking into consideration the equity of the matter, especially where injury of a permanent nature is required to support the child's claim.

2. Workers' Compensation Laws

Workers' compensation benefits are in the nature of a compromise by which the worker receives limited compensation, usually less than that which could have been awarded by a jury, in return for an extended liability and assurance of payment from the employer. Ordinarily, when an injury to an employee occurs in the scope of employment, it is compensable under the workers' compensation laws. Consequently, courts uniformly hold that the statutorily prescribed compensation is the sole remedy and that any common law action against the employer is barred. When a parent is negligently injured while acting within the scope of his employment, the issue is whether the exclusivity provisions of the workers' compensation statutes operate as a bar to claims for loss of consortium.

Logic would suggest that the derivative/independent claim dichotomy would be a useful analytical tool in determining whether exclusivity provisions preclude loss of parental consortium actions against employers where an injured parent is entitled to receive workers' compensation benefits. However, this is not the case. Rather, the majority of courts reason that exclusive remedy provisions, which abolish other civil remedies for injuries to workers and provide that compensation under the act is in lieu of other common law rights, evidence legisla-

tive intent to prohibit common law actions against employers.[90]

Currently, three jurisdictions, Iowa, Massachusetts and Washington, view loss of consortium as an independent claim.[91] Massachusetts recognized that the exclusive remedy provision of its workers' compensation laws did not bar a child's action for loss of parental consortium.[92] This position, however, has subsequently been statutorily modified by the Massachusetts Legislature, which amended its laws to bar consortium claims unless the employee reserved his common law rights at the time of hire.[93] On the other hand, the Washington Supreme Court in *Provost v. Puget Sound Power & Light Co.*[94] clearly utilized the statutory interpretation approach to conclude that loss of parental consortium actions are barred by the state's exclusive remedy statute.

3. Permanent vs. Temporary Injury

The tort of loss of parental consortium, unlike spousal consortium,[95] is concerned with significant interference with the parent-child relationship. Some courts, therefore, have gone to great lengths to define the nature of the injury for which the action intends to compensate. All jurisdictions which recognize loss of parental consortium agree that the child has a right of

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[90] ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 66.10-.21 (1993).

[91] *See* Huber v. Hovey, 501 N.W.2d 53, 57 (Iowa 1993); Eyssi v. City of Lawrence, 618 N.E.2d 1358, 1363 (Mass. 1993) (quoting Feltch v. General Rental Co., 412 N.E.2d 67, 70 (Mass. 1981)); Cornejo v. Washington, 788 P.2d 554, 563 (Wash. Ct. App. 1990).

[92] Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 702 (Mass. 1980).

[93] MASS. GEN. LAWS ANN. ch. 152, § 24 (West. Supp. 1994); *see also Eyssi*, 618 N.E.2d at 1361 (discussing amendment and its affect).

[94] 696 P.2d 1238, 1240-41 (Wash. 1985).

[95] In a spousal consortium action the injured spouse must have suffered an injury which deprives the non-injured spouse of some benefit which formerly existed in the marriage. Consequently, the consortium claim of the non-injured spouse can be based on non-impact injury to the injured spouse, such as emotional distress suffered by the spouse in a zone of danger situation or the injured spouse's emotional distress caused by observing their seriously injured child at the scene of an accident. *See* STEIN, *supra* note 69, § 13.13, at 155.

action when the injured parent has suffered a serious, severe and permanent physically or mentally disabling injury.[96] In jurisdictions where the sole basis for parental consortium is permanent injury and the extent of the parent's injury is in dispute, the trier of fact must make a threshold finding that the injury to the parent satisfies this characterization prior to resolution of the consortium damages issue.

A number of jurisdictions, including Wyoming,[97] Wisconsin,[98] Massachusetts[99] and Michigan[100] seemingly allow recovery for mere negligent injury to a parent regardless of the degree or extent of harm. It should be noted, however, that the seminal cases from these jurisdictions all involved severe and permanent physical or mental injury to the parent.[101] Jurisdictions which adhere to this rule will probably allow recovery where there has been temporary as contrasted with permanent injury to the parent. These jurisdictions treat consortium as a unitary concept embracing all the familial aspects of the parent-child relationship, so that an interference with any of the rights, duties or obligations thereof constitutes a basis for an action for parental consortium.

Temporary injury, as a grounds for a parental consortium claim, is arguably inconsistent with the traditional negligence analysis which, unlike intentional tort analysis, requires proof of actual damages. In essence, compensation for temporary injury unnecessarily assumes that the child will suffer injury from every act of negligent harm to the parent, no matter how slight. There is a substantial likelihood, therefore, that awards based on temporary injuries violate the prohibition against awarding uncertain or speculative damages.[102]

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[96] *See supra* note 34.

[97] *See* Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990).

[98] *See* Theama v. City of Kenosha, 344 N.W.2d 513, 522 (Wis. 1984).

[99] *See Ferriter*, 413 N.E.2d at 692-93.

[100] *See* Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981).

[101] *See Ferriter*, 413 N.E.2d at 691; *Berger*, 303 N.W.2d at 424; Williams v. Hook, 804 P.2d 1131, 1131 (Okla. 1990); *Theama*, 344 N.W.2d at 513; *Nulle*, 797 P.2d at 1171.

[102] Damages which are uncertain, contingent or speculative in nature cannot be

The severe and permanent injury requirement, on the other hand, does not assume injury to the parent-child relationship. It combats frivolity and legitimizes the child's allegation of injury by requiring not only proof of the parental relationship before and after the injury, but also evidence of the extent of the parent's injury. The severe, serious and permanent injury rule also furnishes a natural barometer with which to gauge the inadequacy or excessiveness of the damages award.

C. Assessing Damages Generally

"Damages" has been defined as "a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury whether to his person, property, or rights, through the unlawful act, omission or negligence of another."[103] Damages are given as compensation for injury. The purpose of a damages award is to place the plaintiff in the same position, as far as money can, as he would have been in had there been no breach of duty or injury.[104] The lack of a standard with which to measure damages for loss of parental consortium is a recurrent justification for the refusal by many jurisdictions to recognize the action. In essence, these courts are concerned that the difficulty in defin-

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made the basis of a recovery. Damages may be uncertain, either as to their existence or their nature, or in respect of the cause from which they result. 25 C.J.S. *Damages* § 26 (1966).

[103] BLACK'S LAW DICTIONARY 389 (6th ed. 1990). One court has defined damages as "the word which expresses in dollars and cents the injury sustained by a plaintiff." Washburn v. Pearson, 226 So. 2d 758, 760 (Miss. 1969) (quoting Fidelity & Casualty Co. v. Huse & Carleton, Inc., 172 N.E. 590, 593 (Mass. 1930)).

[104] *See* Lee v. Southern Homes Sites Corp., 429 F.2d 290, 293 (5th Cir. 1970). One justification for denying the action for parental consortium is that money cannot fairly compensate the child. Jurisdictions which recognize the action have typically responded to this argument in the following manner:

> Although a monetary award may be a poor substitute for the loss of a parent's society and companionship, it is the only workable way that our legal system has found to ease the injured party's tragic loss. We recognize this as a shortcoming of our society, yet we believe that allowing such an award is clearly preferable to completely denying recovery. . . .

Theama, 344 N.W.2d at 520.

ing and quantifying damages may lead to double recovery. This justification, however, is without merit. While there are established measures of damages for particular situations, the measure to be used in any given case should depend on the principles of fairness and the individual facts of the case, including the pleadings, evidence, theories and arguments selected. The fact that damages cannot be computed without difficulty or with demonstrable accuracy is not enough to deny the plaintiff's cause.[105] Rather, the jury is entrusted with the difficult task of determining the damage award.[106]

Much of the law in regards to parental consortium can be borrowed from other well established and accepted areas of the law. For example, the proper standard with which to measure damages in loss of parental consortium actions is the standard currently used in cases involving wrongful death actions.[107] Wrongful death statutes uniformly allow children to recover for the loss of companionship and society of a tortiously killed parent.[108] Here, as with other intangible losses such as pain

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[105] The uncertainty of proving damages should not preclude the granting of relief. As one commentator stated:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 27 (1935).

[106] *See, e.g.*, Beagle v. Vasold, 417 P.2d 673, 675 (Cal. 1966) ("[T]he jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy."); Alamo Rent-A-Car, Inc. v. Clay, 586 So. 2d 394, 395 (Fla. 1991) (examining Florida's wrongful death statute and observing that monetary value of intangible losses to child of his father's companionship and parental influence is compensation which may be properly assessed only by jury).

[107] Both parental consortium and wrongful death actions are concerned with providing recovery for intangible losses. While wrongful death actions did not exist at common law, they have been statutorily recognized in every jurisdiction. Furthermore, courts have utilized common law precepts to fill in the gaps left by legislatures. Dobbs, *supra* note 42, § 8.2. Borrowing from the law of wrongful death also assures uniformity and certainty in the law and its application.

[108] *See* KEETON, ET AL., *supra* note 4, § 127, at 952-53; Petrilli, *supra* note 47, at 328. Twenty-five jurisdictions allow recovery for loss of consortium through

and suffering, the issue may be resolved by the impartial conscience and judgment of the jurors who are expected to act reasonably and intelligently in light of the evidence presented.[109]

A basic premise of the law of compensation is that a plaintiff can receive only one satisfaction for damages arising out of the same facts.[110] Consequently, the different methods of ascertaining damages in a particular situation should not be applied in such a manner as to give double compensation for the same injury. The prohibition against double recovery grew out of the rule that the law should not permit a person to realize a profit or put him in a better position than he would have been in had there been no injury.[111] The concern that the plaintiff will receive double recovery because the child and parent will receive compensation for the same injuries is a legitimate one. Nevertheless, this concern can be alleviated with the use of the procedural devices of joinder of actions, appropriate jury instructions and special verdicts.[112]

1. Joinder

A joinder requirement is essential to the continued vitality of parental consortium. A mandatory joinder rule alleviates the majority of concerns articulated as grounds for denying the action.[113] Mandatory joinder negates the possibility of a multi-

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wrongful death statutes, while an additional fourteen jurisdictions allow similar recovery under statutes containing language that initially had been construed as limiting recovery to pecuniary loss. For a list of cases and citations, see Mogill, *supra* note 3, at 1331 nn.79-81.

[109] *See supra* note 106 and accompanying text.

[110] DOBBS, *supra* note 42, § 1.5.

[111] 25 C.J.S. *Damages* § 3 (1966).

[112] *See* Borer v. American Airlines, Inc., 563 P.2d 858, 866-70 (Cal. 1977) (Mosk, J., dissenting).

[113] Multiplicity of suits and likelihood of double recovery have been cited by the courts as among the major reasons for denying the action. A number of jurisdictions have conditioned recognition of the action "on a requirement that the child's claims be joined with his injured parent's claim. If a child's consortium claim is brought separately, the burden will be on the plaintiff to show why joinder was not feasible." Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148 (Iowa

plicity of suits, diminishes administrative concerns and also lessens the likelihood of duplicitous recoveries. In essence, a joinder rule assures that all the claims and parties, those of children included, are before the court in the same instance. This provides courts with an opportunity to examine each element of damage and utilize pre-trial procedure to dispose of untenable claims. Joinder also provides courts with an opportunity to determine eligibility and to equitably apportion the damages award among the children.[114]

Every jurisdiction has specific periods of limitation within which every civil action must be brought or otherwise forfeited. One rationale for statutes of limitation is that it is fundamentally unfair and prejudicial to the defendant if the plaintiff is allowed an infinite period within which to seek legal recourse for interference with a protected interest. It is uniformly agreed, however, that fairness must also be shown to the plaintiff operating under a disability at the time of the invasion. Consequently, periods of limitation are ordinarily tolled for certain legislatively prescribed reasons.

The disability of minority is one of the more common reasons for tolling the operation of statutes of limitation. Mandatory joinder eliminates multiple lawsuits by removing parental consortium claims from the ambit of ordinary tolling statutes. Were this not the case, siblings could decide to forego litigation of their claims until the disability is removed from each child, respectively. Thus, due to the different ages and number of children, the defendant is put in the unfair position of having to bear the expense of multiple suits over an indefinite period of time.

1983); *see also* Hay v. Medical Ctr. Hosp., 496 A.2d 939, 943-44 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 194-95 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830, 838-39 (W. Va. 1990); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1175-76 (Wyo. 1990).

[114] All agree that there must be some limits on tort recovery. Parental consortium is not an exception to this rule. The decision where the limitation exists is essentially political. But in the context of loss of parental consortium it revolves around such considerations as age, maturity, and physical and mental disabilities.

One alternative to mandatory joinder is to allow the defendant to require joinder. This view, followed in only one jurisdiction currently recognizing loss of parental consortium, is merely a modification of the mandatory joinder rule.[115] The rationale for this view is that because minority ordinarily tolls the statute of limitations, it is unfair to the defendant to allow claimants to wait until after their eighteenth birthday to bring their consortium claims.[116] This rationale is identical to that which underlies the mandatory joinder rule. The strict rule requiring joinder unless infeasible, however, negates placing this burden on the defendant who may inadvertently fail to exercise it. Under mandatory joinder, the plaintiff bears the burden of proving the infeasibility of joinder.[117] Additionally, mandatory joinder also encourages settlement.

Joinder also lessens the likelihood that the defendant will pay twice for the same element of damages. For example, an injured parent and non-injured spouse bring an action against a tortfeasor and recover for loss of earnings. Counsel for the child of the injured parent subsequently seeks compensation for the child's loss of "support and maintenance, care, society, affection and kindness." Arguably, the claim for parental "support and maintenance" gives rise to the objection that compensation of such loss would cause the defendant to pay twice for the same element of damage.[118] The claim for "support and maintenance" should be severed from the child's action while the claims for loss of care, society, affection and kindness

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[115] *See* Villareal v. Arizona Dep't of Transp., 774 P.2d 213, 220 (Ariz. 1989).

[116] *Villareal*, 774 P.2d at 220.

[117] *See, e.g.*, *Weitl*, 311 N.W.2d at 270; WASHINGTON PATTERN JURY INSTRUCTIONS (CIVIL) 32.05 cmt. (3d ed. 1989).

[118] Lawyers should exercise great care in drafting parental consortium claims. As illustrated in the text, the claim for lost earnings by the parents and lost support and maintenance by the child are identical. Given the novelty of parental consortium, it is probably better to assert claims which are clearly unrelated to claims already asserted by either parent. For example, the objections raised by the defendant alleging double payment could be avoided by merely seeking recovery of damages for loss of care, affection and kindness. *See, e.g.*, Pleasant v. Washington Sand & Gravel Co., 262 F.2d 471, 473 (D.C. Cir. 1958); Russell v. Salem Transp. Co., 295 A.2d 862, 864 (N.J. 1972).

should be allowed to continue to the jury.[119] Thus, mandatory joinder gives the court an opportunity to scrutinize each aspect of the child's claim against those of the injured parent.

2. *Damages Recoverable*

Pecuniary damages, such as lost income, which are likely to be used for the benefit of the child are recoverable in the parent's action but not in the child's claim.[120] As observed by Justice Kauger, writing for the court, in *Williams v. Hook*:[121]

> The entire sum which would have been available as a resource for the parent to provide support and benefits to the child, be they essential or recreational, is recovered by the parent. A cause of action for loss of parental consortium is limited primarily to an award based on the emotional suffering of the child, and recovery is limited to loss of the parent's society and companionship.[122]

Economic losses are not recoverable in a loss of parental consortium action under circumstances where a parent is negligently injured rather than killed.[123] This rule precludes the child from recovering for the "value of nursing, domestic or household services provided by the minor child to the injured parent."[124] The value of services, other than those of the parent to the child,[125] like economic losses, are recoverable by the

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[119] *See supra* note 118.

[120] *See* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987); Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990); Belcher v. Gains, 400 S.E.2d 830, 843 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984).

[121] 804 P.2d 1131 (Okla. 1990).

[122] *Williams*, 804 P.2d at 1135.

[123] *Id.* In *Williams*, the issue of whether economic losses can ever be recovered in a parental consortium claim was expressly reserved by the Oklahoma Supreme Court. *Id.* at 1135 n.13.

[124] *See Belcher*, 400 S.E.2d at 843.

[125] Weitl v. Moes, 311 N.W.2d 259, 269 (Iowa 1981), *overruled by* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 355 N.W.2d 148 (Iowa 1983). The value of the parent's services to the child are economic in nature. *Weitl*, 311 N.W.2d at 269. However, because this element of damages is not recoverable in the parent's action, it is allowed in the child's. *Id.*; *see, e.g.*, MICHIGAN STANDARD

injured parent. A rule to the contrary would certainly lead to the defendant paying double compensation for the same injury.[126] Factors which should be considered in assessing damages include the severity of the injury to the parent and its actual effect upon the parent-child relationship, the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics and whether other consortium providing relationships are available to the child.[127]

The measure of damages in a loss of parental consortium claim is also affected by the standing rule followed in a particular jurisdiction. Where standing is limited to minor children and injury of a permanent nature occurs, the measure of damages is limited to the number of years remaining until majority. This limitation is inapplicable where standing is not limited to minority. Where such is the case, damages for permanent consortium loss are based on the shorter of the injured parent's or child's life expectancies.[128]

JURY INSTRUCTIONS—CIVIL 52.02 (2d ed. 1990). The Michigan instruction provides in pertinent part:

> In this case [plaintiff] is claiming that [he/she] sustained damages as a result of injury to [his/her] [father/mother]. If you find that [plaintiff] [is/would be] entitled to damages, then it is your duty to determine the amount of money which will reasonably, fairly and adequately compensate [plaintiff] for any of the following elements of damage [he/she] has sustained to the present time as a result of injury to [his/her] [father/mother].
>
> a. the reasonable value of the services of [his/her] [father/mother] of which [he/she] has been deprived.

Id. Regarding determination of a damage award, Prosser explains that "[d]ifficult problems remain, however. Since the injured husband (for example) is entitled to recover for his own diminished earning capacity, the wife's consortium claim for loss of services must not be allowed to include lost services that are also part of that diminished capacity." KEETON ET AL., *supra* note 4, § 125, at 933.

[126] *But cf.* Villareal v. Arizona Dep't of Transp., 775 P.2d 213, 220 (Ariz. 1989) (including "support" among elements of damages for which child can recover); *Williams*, 804 P.2d at 1135 n.13 (declining to address issue of whether economic loss is ever recoverable in parental consortium action).

[127] *See Villareal*, 774 P.2d at 220-21; Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990); *Belcher*, 400 S.E.2d at 842.

[128] *See* Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 152 (Iowa 1983).

Parental consortium also seeks to protect the child's interest in mental and psychological well being. Accordingly, damages for emotional distress are recoverable separate and apart from an action for negligent infliction of emotional distress.[129]

3. Jury Instructions

There are four basic models for drafting parental consortium instructions. The first model consists of one very broad instruction which merely mentions certain aspects of the action. Illustrative of this model is Alaska's model instruction which provides:

> The (first, second, etc.) item of non-economic loss is claimed not by (name of principal plaintiff(s)) but by (his/her/their) (child/children). The child(ren) claim(s) that an injury to the (name of principal plaintiff) legally caused by the defendant(s) has damaged the relationship between parent and child.
>
> You may make an award for the fair value of the loss of the enjoyment, care, guidance, love and protection that the child(ren) have suffered or are reasonably probable to suffer in the future. In deciding whether such a loss has occurred and the amount of any award, you may consider, among other things, evidence relating to the nature of the relationship between parent(s) and child(ren).
>
> If you decide to make an award to the child(ren) for this claimed loss, your award must not include any amount that duplicates any award to (name of principal plaintiff). For example, you should not make an award to the child(ren) for any loss of financial support from their parent, because that amount would already be included in the parent's right to recover for loss of earnings or loss of (his/her) ability to earn money.[130]

This instruction does not attempt to define for the jury the interests that parental consortium protects. Neither does it

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[129] *See, e.g., Villareal*, 774 P.2d at 220; *Williams*, 804 P.2d at 1135; Hays v. Medical Ctr. Hosp., 496 A.2d 939, 942 (Vt. 1985).

[130] ALASKA CIVIL PATTERN JURY INSTRUCTIONS 20.09 (1990).

articulate a prima facie case upon which the damages award is based. This model in all likelihood will lead to jury confusion and questionable awards due to the absence of a prima facie requirement and basic articulation of the interests protected by parental consortium.

The second model consists of several instructions. The first instruction defines parental consortium and/or sets out the prima facie case. Thereafter, a separate instruction detailing the measure of damages and the effect of the injured parent's comparative negligence is given. Oklahoma's parental consortium instructions are excellent examples of this model. That instruction provides:

> [Plaintiff] has sued [Defendant] for loss of parental consortium as a result of the injury to [Parent]. Parental consortium is defined as the love, care, companionship, and guidance given by a parent to a minor child. For [Plaintiff] to recover on this claim you must find all the following:
> A. [Parent] is entitled to recover damages from [Defendant] for [his/her] injuries.
> B. [Parent]'s injury is permanent.
> C. [Plaintiff] was a minor [or incapacitated dependent] child of [Parent] at the time [Parent] sustained the injuries.
> D. As a result of the injuries sustained by [Parent], [Plaintiff] sustained a loss of parental consortium.[131]

The measure of damages instruction provides:

> If you decide for [Plaintiff] on the question of liability, you must then determine the amount of money which will reasonably and fairly compensate [him/her] for the value of the parental consortium [he/she] has lost, and for the value of the loss of parental consortium [he/she] is reasonably certain to sustain until [he/she] reaches the age of eighteen.
>
> You are instructed that if you use the White Verdict Form, you should determine the full value of the loss of consortium. Whatever dollar amount you determine will be re-

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[131] OKLAHOMA UNIFORM JURY INSTRUCTIONS (CIVIL) 4.7 (2d ed. 1993); *cf.* MICHIGAN STANDARD JURY INSTRUCTIONS—CIVIL 52.02 (2d ed. 1990) (consisting of only one instruction on measure of damages).

duced by the Court by that percentage of negligence which you have attached to [Parent].[132]

This model suffers no major shortcomings. It is informative and avoids prolixity. Thus, this model enhances the likelihood that the jury will understand the rules for carrying out its responsibilities.

The third model, utilized in Texas, consists of a combination of instructions. The first instruction defines the concept of parental consortium. Thereafter, the jury is given a series of questions. Each question must be answered in the affirmative in order to reach the issue of damages. The Texas instructions provide:

> If you have answered Question(s)[questions establishing liability of one or more defendants] "Yes," then answer the following Question. Otherwise, do not answer the following question.
>
> QUESTION
>
> Was the physical injury to [Plaintiff] a serious, permanent, and disabling injury?
>
> Answer "Yes" or "No"
>
> Answer:[133]
>
> If you answered Question [7.10] "Yes," then answer the following question. Otherwise, do not answer the following question.
>
> QUESTION
>
> What sum of money, if paid now in cash, would fairly and reasonably compensate [Plaintiff] for the loss, if any, of parental consortium that resulted from the physical injury to [Parent].
>
> "Parental consortium" means the positive benefits flowing from the parent's love, affection, protection, emotional support, services, companionship, care and society.
>
> In considering your answer to this question, you may consider only the following factors: the severity of the injury to parent and its actual effect on the parent-child relation-

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[132] OKLAHOMA UNIFORM JURY INSTRUCTIONS (CIVIL) 4.8 (2d ed. 1993).

[133] TEXAS PATTERN JURY CHARGES 7.10 (1987).

> ship, the child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium-giving relationships are available to the child.
>
> Do not include interest on any amount of damages you find. Do not reduce the amounts, if any, in your answer because of the negligence, if any, of [Parent].[134]

This model is simplistic and avoids confusion through its step by step approach to parental consortium. It avoids the use of spousal consortium instructions and requires that the jury determine the merits of the case before addressing damages.

A fourth, and not very popular, model merely contemplates the insertion of a parental consortium measure of damages statement into general personal injury instructions.[135] This model provides the jury with little, if any, actual information about the underlying cause of action.

Well drafted jury instructions are important in parental consortium actions, especially if double recoveries and excessive or inadequate verdicts are to be prevented. Much of the language used in parental consortium jury instructions is purely discretionary. However, the court should instruct the jury that the child's damages for parental consortium are separate and distinct from the parent's recovery, and that any award will "accrue directly to the child rather than be lumped in with that of the parent who may or may not spend it for the child's benefit."[136]

Carefully drafted instructions should also inform the jury of the nature of the action for parental consortium. This can be achieved either by defining the concept for the jury and/or by setting out a specific prima facie case which the plaintiff must satisfy in order to recover. The jury should also be instructed

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[134] *Id.* 7.11B.

[135] *See* WASHINGTON PATTERN JURY INSTRUCTIONS (CIVIL) 32.05 (3d ed. 1989).

[136] Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981); *see* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 996 (Alaska 1987); Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984); Theama v. City of Kenosha, 344 N.W.2d 513, 516 (Wis. 1984).

on the factors that can be considered in assessing damages.[137] Likewise, an instruction prohibiting double recoveries and outlining the specific elements of damages would lessen the probability of confusion and excessive or inadequate damages.

4. Sentimental vs. Material Damages

At early common law, consortium protected only the right that husbands had to the services of their injured wives.[138] Consequently, early common law courts interpreted consortium to include only the material, economic or tangible aspects of the marital relationship. Consortium, therefore, did not protect non-pecuniary interests.

Contemporary courts, unlike their early counterparts, define consortium quite broadly to include all aspects of the spousal relationship. Consequently, awards for spousal consortium have been expanded to compensate for impairment of not only material losses, but also sentimental ones. Material losses correspond to economically quantifiable, tangible, pecuniary losses, while sentimental aspects refer to intangible, non-pecuniary, non-economic losses not suitable for market valuation.[139] The terms "society, companionship, affection, love, and care" all reflect the non-quantifiable sentimental elements of consortium. The term "services" typifies the material, economically quantifiable element of consortium.

The distinctions between the concepts of material and sentimental losses has in the law of spousal consortium become blurred. Regardless of how the various jurisdictions characterize consortium, therefore, all courts evaluate the same factors as proof of loss of consortium.[140]

Courts recognizing loss of parental consortium claims have characterized the action, in varying degrees, as the right of children to the love, care, society, guidance, services and com-

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[137] *See supra* note 127 and accompanying text.
[138] *See supra* note 4 and accompanying text.
[139] Ridgeway, *supra* note 3, at 350.
[140] *Id.* at 351.

panionship of the injured parent.[141] Arguably, the inclusion of the word "services" in the characterization of parental consortium suggests that children, as well as the injured parent, may recover for material and sentimental losses. This, however, is not the case. The sentimental/material dichotomy is alive and well in the law of loss of parental consortium. This action is intended to protect only the child's sentimental, non-pecuniary interests in the filial relationship. Thus, the general rule is that all material, pecuniary losses, such as those for services, can be recovered only by the injured parent in a direct action against the tortfeasor. The sentimental/material dichotomy in parental consortium further prevents double recovery. Logic dictates that once the injured parent is compensated and made whole, the primary obligation to financially care for the child shifts back to the parent.

Problems, however, do remain. Since the injured parent is entitled to recover for his own diminished earning capacity, the child's consortium claim cannot be allowed to include lost services that are also part of the diminished capacity of the parent. In Michigan, where the term "services" is expressly used to characterize damages in loss of parental consortium claims,[142] a different rule has developed. This rule provides that damages for loss of the parent's services cannot be recovered by both the injured parent and child. Though it is possible for the child to recover for loss of the injured parent's services, no significant breach of the general rule results because either the parent or the child, but not both, may recover. This rule, like the absolute prohibition against a child recovering for loss of services, achieves the same end as that achieved by the sentimental/material dichotomy.

Texas, like Michigan, uses the term "services" to characterize damages recoverable in a parental consortium action.[143] Texas, however, treats the term "services" as a non-pecuniary

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[141] *See supra* note 34.

[142] *See* Berger v. Weber, 303 N.W.2d 424, 425 (Mich. 1981); *see also* MICHIGAN STANDARD JURY INSTRUCTIONS—CIVIL 52.02 (2d ed. 1990).

[143] *See* Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1990).

loss.[144] A similar view is followed in Iowa, which defines consortium to include the present value of the "services" which would have been rendered by a parent to the child.[145] However, Iowa further provides that loss of financial support is not included in the damages recoverable in a parental consortium action.[146]

D. The Prima Facie Case

The prima facie case requirement for parental consortium depends upon how courts respond to three substantive issues: standing (minor/adult child); the nature or quality of the injury required (temporary/permanent); and how the jurisdiction in question views consortium claims (derivative/independent). Ordinarily the plaintiff must prove: (1) he or she has standing to sue; (2) an injury of the quality required under the law of his jurisdiction has occurred; (3) the filial relationship; and (4) actual harm to the filial relationship and plaintiff.

Jurisdictions which limit standing to minor children, require permanent injury and view consortium claims as derivative. The plaintiff must show that: (1) parent has suffered a compensable injury; (2) the injury is permanent; (3) plaintiff was a minor at the time of the injury; and (4) as a result of the injury to the parent, the plaintiff has suffered a loss of parental consortium. The measure of damages where standing is limited to minor children may not exceed the number of years remaining until plaintiff reaches majority age. The court presumes damage to the filial relationship once the plaintiff has shown that the parent's injury was permanent in nature. However, the plaintiff must still put on evidence of the relationship before and after the injury. This evidence will influence the amount of damages awarded.

In a jurisdiction such as Iowa, which does not limit standing to minor children or view consortium as derivative, the

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[144] *Reagan*, 804 S.W.2d at 467.

[145] Audubon-Exira Ready Mix, Inc. v. Illinois Cent. G.R.R., 335 N.W.2d 148, 152 (Iowa 1983).

[146] *See* IOWA CIVIL JURY INSTRUCTIONS 200.20 (1991).

prima facie requirement consists of evidence that: (1) the parent has suffered an injury; (2) the injury is permanent; and (3) as a result of the injury to the parent, the plaintiff has suffered a loss of parental consortium. The proof required to satisfy this prima facie case differs greatly from the prima facie case set out above only where the plaintiff is an adult child. In order to recover substantial damages, an adult child must put on evidence of a strong filial relationship. This evidence must demonstrate that the adult child continues to look to the injured parent for substantial economic, emotional and psychological support. A presumption of injury to the filial relationship does not arise in favor of non-dependent adult children. Likewise, where adult children are allowed to recover for loss of parental consortium, the trier of fact determines the damages for permanent injury based on the shorter of the injured parent's or child's life expectancies.

Another prima facie case scenario is followed in jurisdictions which do not treat consortium as derivative or require permanent injury. In such jurisdictions the evidence must show that: (1) the parent has suffered an injury; and (2) as a result of the injury to the parent, the plaintiff has suffered a loss of parental consortium.

The chart below illustrates how jurisdictions that currently recognize the action have responded to the issues of standing (minor/adult child); the nature or quality of the injury required (temporary/permanent); and how consortium claims (derivative/independent) should be viewed.

STATE	STANDING		NATURE of INJURY		PARENTAL CONSORTIUM		SPOUSAL CONSORTIUM	
	Minor \ Adult		Permanent \ Temporary		Independent \ Derivative		Independent \ Derivative	
Alaska	Yes	No	Yes	No	undecided	undecided	No	Yes
Arizona	Yes	Yes	Yes	No		Yes		
Iowa	Yes	Yes	Yes	No	undecided	undecided	Yes	No
Mass.	Yes	No	Yes	Yes	undecided	undecided	Yes	No
Michigan	Yes	No	Yes	Yes	Undecided	undecided	No	Yes
Montana	Yes	No	Yes	No		Yes	No	Yes
Oklahoma	Yes	No	Yes	No	undecided	undecided	No	Yes
Texas	Yes	Yes	Yes	No		Yes	No	Yes
Vermont	Yes	No	Yes	No		Yes	No	Yes
Wash.	Yes	Yes	Yes	No		Yes	Yes	No
Wis.	Yes	No	Yes	Yes		Yes	No	Yes
Wyoming	Yes	No	Yes	Yes	undecided	undecided	No	Yes
Ohio	Yes	No	Yes	No		Yes		Yes
W. Va.	Yes	No	Yes	No		Yes	No	Yes

E. An Ending But Not A Conclusion

Continued efforts to expand the concept of consortium are inevitable.[147] This is due, in part, to the difficulty courts have experienced in articulating a precise definition of the concept. Inherently nebulous, the concept of consortium was originally used to describe the husband's action for the loss of his wife's services. The concept was subsequently expanded to protect the husband's interest in his wife's services, as well as her companionship, love, society and sexual relationship.

Thereafter, consortium was further broadened beyond its common law definition to include the right of the wife to the benefits of the marital relationship. Since then, consortium has taken on a descriptive, rather than definitive meaning. Generally, consortium has been used to describe such elements of damages as companionship, love, solace, affection and services. It has simultaneously been used to connote a substantive cause of action. Many courts, however, still cling to the archaic notion that consortium protects only the conjugal fellowship of spouses. These same courts, however, recognize that other nonspousal filial relationships are entitled to legal protection. The legal profession, in response, has identified the law of consortium as the proper avenue to an otherwise accepted end. The legal protection accorded the parent-child relationship is analogous to a two way street. Along one street runs the child's interest in the love, affection and care of an injured parent. Along the other travels the corresponding interests of parents in the love, affection and attention of an injured child. While more jurisdictions have recognized the right of a child to recover for negligent injury to a parent, a strong contingent of jurisdictions have undertaken to protect the consortium interest of

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[147] *See generally* Catherine O'Brien, *Some Lawyers Argue that Twins Need Legal Rights*, TULSA WORLD NEWSP., Dec. 28, 1993, at 13. Lawyers in California have filed several law suits in which they contend that twins' experiences bind them so closely together that they also share a special legal status. Death or disfigurement of one destroys the twins' bond entitling them to special compensation. *Id.*

parents in nonfatally injured children.[148]

The kinship between the two actions is more than historical and theoretical. This fact is demonstrated by the case of *United States v. Dempsey*.[149] In *Dempsey*, the Eleventh Circuit Court of Appeals submitted on certification to the Supreme Court of Florida the question whether Florida law permits parents to recover for the loss of a child's companionship and society.[150] The court observed that Florida law had for some time recognized the parent's right to recover for such losses.[151] Nevertheless, the court went on to emphatically state that "even if this court previously had not expanded the common law to allow recovery for the loss of a negligently injured child's companionship, we would do so now."[152] The *Dempsey* court found additional support for its conclusion in section 768.0145 of the Florida Statutes which created the right of children to recover loss of consortium damages for permanent injury to a parent.[153] Considered together, the statute, constitution and case law manifested a strong pronouncement that familial relationships should be protected and that recovery be had for wrongful injuries adversely affecting those relationships.[154] Recognizing the substantive similarities between the parents' claim and that of children, the court concluded that recovery for loss of filial consortium should be limited in the same manner.[155]

The arguments for and against protection of the parent's consortium interest in instances where a child is negligently but nonfatally injured are identical to those articulated in parental consortium.[156] These filial relationships differ from the spousal relationship only with regards to the sexual aspect of

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[148] For a list of the jurisdictions protecting the parents' consortium interest, see *supra* note 24.

[149] 635 So. 2d 961 (Fla. 1994).

[150] *Dempsey*, 635 So. 2d at 962.

[151] *Id.* at 963.

[152] *Id.* at 964.

[153] FLA. STAT. ANN. § 786.0145 (West Supp. 1994).

[154] *Dempsey*, 635 So. 2d. at 964-65.

[155] *Id.*

[156] Johnson, *supra* note 23, at 762-64.

the latter. The major policy concern, much like that in parental consortium, is not whether the filial relationship is entitled to legal protection, but rather whether consortium, which historically was only concerned with the conjugal relationship, is the proper means for achieving this end. Consequently, some courts that protect the interest of parents no longer employ the term consortium to describe the legal protection accorded.[157]

Neither the use or disuse of the concept of consortium resolves the issue of whether consortium should be expanded to protect other non-spousal filial relationships. Nor does resolution of the issue require the creation of a new cause of action. Compensating parents and children for loss of the other's society and companionship merely requires a redefining of the protected aspects of the family relationship. The judicial reception that filial protection has received over the past fourteen years suggests that courts should refrain from engaging in euphemistic logomachy. Rather, compensating parents and children for the loss of the other's society "represents a shift in our cultural expression of the importance of various aspects of the filial relationship and the degree of protection each deserves."[158]

In 1976, Professor Jean Love began what eventually would become a universal call for the protection of the parent-child and child-parent relationships.[159] Less than four years later, the Supreme Court of Massachusetts adopted the logic and appeal of Professor Love's work and became the first jurisdiction to recognize an action for parental consortium.[160] In the fourteen years since the Massachusetts decision, this logic and appeal has swiftly spread across the country. As such, contem-

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[157] *See, e.g.*, Norvell v. Cuyahoga County Hosp., 463 N.E.2d 111, 114 (Ohio Ct. App. 1983) (concluding that parents may recover for loss of child's society, services, companionship, comfort, love and solace); Shockley v. Prier, 225 N.W.2d 495, 501 (Wis. 1975) (stating that parent may recover for loss of child's aid, comfort, society and companionship); *cf.* Frank v. Superior Ct. of Ariz., 722 P.2d 955, 961 (Ariz. 1986) (retaining concept of consortium).

[158] Johnson, *supra* note 23, at 778.

[159] *See* Love, *supra* note 31, at 594-95.

[160] *See* Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 703 (Mass. 1980).

porary courts can no longer turn a blind eye to the subject of filial rights.

What remains is the test of trial and error against which all common law rights are meted. These tests, and how well filial protection fairs, will be the subject of future scholarly works. However, it is hoped that the discussions and observations contained herein will help direct and influence the future development of the law in this area.

COMMENTS

THE MEDICAL EXPERT WITNESS IN MISSISSIPPI: OUTGUNNING THE OPPOSITION

The task of the medical expert witness is to assist the trier of fact in finding the truth. Attorneys hire a medical expert witness most commonly in medical malpractice cases, personal injury suits, and workers' compensation claims. While the use and role of medical experts is constantly expanding, this comment focuses on the use of the medical expert witness strictly in the realm of physician negligence.

Perhaps the greatest hurdle a plaintiff's attorney must overcome in establishing a prima facie case of medical professional negligence is securing competent testimony from a qualified medical expert witness.[1] Traditionally, doctors have been hesitant to testify against their fellow colleagues.[2] This "conspiracy of silence" has produced few defectors, further bolstering the plaintiff's obstacle against recruiting the necessary medical expert witness.[3] Likewise, the medical malprac-

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[1] Canterbury v. Spence, 464 F.2d 772, 792-93 n.124 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1974); *see also* Fred R. Cornilles, Note, *Evidence—Expert Testimony—Oregon Medical-Malpractice Cases*, 40 OR. L. REV. 343, 344 (1961) (discussing "great obstacle" facing lawyer in medical malpractice case).

[2] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 164 (4th ed. 1971). In his treatise, Professor Prosser recognized the "well-known reluctance of doctors to testify against one another. . . ." *Id.*

[3] Commentators and critics disagree as to the basis for a doctor's reluctance

tice defendant is often presented the equally difficult challenge to locate a suitable medical expert.[4] Consequently, what frequently occurs is that expert will be pitted against expert. The trial court, therefore, must rule on the expert's competency as a witness and the admissibility of testimony, while the jury must scrutinize all factors surrounding the witness in deciding what weight to give to the testimonial evidence. This "battle of experts," and frequently the case itself, will be won by the attorney most skilled in handpicking a medical expert witness fully competent under the rules of evidence, applicable state statutes, and case law.[5] Furthermore, jury impact, credibility and impeachment are incentives for enlisting the services of the medical expert witness most qualified to address the issues in a particular controversy. This comment favors neither the plaintiff's charge nor the defendant's resistance, but instead examines the intricacies involved in drafting and deploying the medical expert witness into the medical malpractice battle in Mississippi.

Historically, a medical expert witness was not essential to establishing negligence in a medical malpractice action.[6] For

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to testify against a fellow doctor. Some commentators blame the silence on doctors' training and the Hippocratic Oath. Joseph Kelner, *The Silent Doctors—The Conspiracy of Silence*, 5 U. RICH. L. REV. 119, 120 (1970). Others simply place the blame on the "professional pride and camaraderie of the medical profession." Richard M. Marshkus, *Conspiracy of Silence*, 14 CLEV.-MAR. L. REV. 520, 523 (1965); *see also* Brown v. Keanveny, 326 F.2d 660, 661 (D.C. Cir. 1963) (Wright, J., dissenting) (finding that physician "self-preservation" is impetus of conspiracy of silence); Huffman v. Lindquist, 234 P.2d 34, 45 (Cal. 1951) (finding physicians reluctant to testify due to professional pressure). *But see* Fairley v. Meadows, 404 S.E.2d 537, 540 (W. Va. 1991) (opining that "doctors will gladly don their boxing gloves for reasonable fee"). *See generally* Trull v. Long, 621 So. 2d 1278 (Ala. 1993) (analyzing history of conspiracy of silence).

[4] Darrell L. Keith, *Medical Expert Testimony in Texas Medical Malpractice Cases*, 43 BAYLOR L. REV. 1, 3 (1991). Medical expert testimony is frequently the "cornerstone" of medical malpractice cases. *Id.* at 2.

[5] *See generally* David E. Seidelson, *Medical Malpractice Cases and the Reluctant Expert*, 16 CATH. U. L. REV. 158 (1966) (discussing options to encourage expert medical testimony). Despite attempts by courts to reform the need for medical expert testimony, the practical fact remains that a competent medical expert witness is the "sine qua non" of the modern medical malpractice case. *Id.* at 162.

[6] *See* Wiggins v. Piver, 171 S.E.2d 393, 396 (N.C. 1970); *see also* Rickee N.

example, in *Cross v. Guthery*,[7] the Connecticut court in 1794 overlooked any requirement of expert testimony in a medical negligence claim against a surgeon for "unskillful" performance of a mastectomy upon the plaintiff's wife resulting in death.[8] The first American case requiring expert testimony in a medical malpractice action was the 1897 case of *Ewing v. Goode*.[9] In *Ewing*, the court timely recognized the critical importance of medical expert testimony in matters involving a highly specialized profession in which a layman may have little knowledge at all.[10] The plaintiff in *Ewing* alleged that her physician, a surgeon and oculist, failed to use proper care and skill in operating on her eye and was negligent in postoperative follow-up, subsequently causing the ultimate loss of vision in the patient's right eye and impaired vision in her left eye.[11] Although the plaintiff offered expert medical testimony at trial, the court found that the defendant exercised the requisite care and skill.[12] In deciding the case on its merits, the court delineated the rationale for providing expert medical testimony:

> [W]hen a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence ap-

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Arntz, Comment, *Competency of Medical Expert Witnesses: Standards and Qualifications*, 24 CREIGHTON L. REV. 1359, 1361 (1991).

[7] 2 Root 90 (Conn. 1794).

[8] *Cross*, 2 Root at 91-92.

[9] 78 F. 442 (C.C.S.D. Ohio 1897).

[10] *Ewing*, 78 F. at 444.

[11] *Id.* at 443. The plaintiff suffered cataracts in both her eyes causing her to seek medical treatment. *Id.* at 444. The defendant determined the right cataract would be removed first. *Id.* The plaintiff subsequently underwent three operations on her right eye. *Id.* at 447. After continued pain, however, the plaintiff's right eye was removed. *Id.*

[12] *Id.* at 448-49. The court was unable to find a "scintilla of evidence" that proved the defendant acted negligently. *Id.* Therefore, the court found that the defendant conducted each of the three operations with due skill and care. *Id.* at 450.

> plied to the facts, there is no evidence of it proper to be submitted to the jury.[13]

Since *Ewing*, the rules governing medical expert witnesses have mushroomed into a voluminous body of law. The Federal Rules of Evidence provide guidelines for the use of the medical expert as a witness. Specifically, Rule 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[14]

The Mississippi Supreme Court adopted the Mississippi Rules of Evidence, effective January 1, 1986, essentially mirroring, with few variations, the federal evidentiary rules governing expert witnesses.[15] The modest amount of Mississippi case law dealing with medical expert witnesses, both prior and subsequent to the adoption of the Mississippi Rules of Evidence, will be dissected by this comment. Before proceeding with this exploratory operation, however, a survey of statutory provisions regulating the use of the medical expert witness is necessary.

In response to criticism of the "professional medical expert witness," dubbed the "circuit-riding charlatan" by the Mississippi Supreme Court,[16] who traveled from case to case providing expert medical testimony, numerous states adopted legislation governing the testimony of the medical expert witness.[17] The

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[13] *Id.* at 444.

[14] FED. R. EVID. 702.

[15] *See* Order of September 24, 1985, *reprinted in* 474-77 So. 2d xxvii (Miss. 1985) (Miss. case ed.).

[16] Hall v. Hilbun, 466 So. 2d 856, 875 (Miss. 1985). The court directs this remark to an outside expert witness who travels into a jurisdiction solely to render his professional opinion, and who, upon completion of that task, subsequently moves on. *Hilbun*, 466 So. 2d at 875; *see also* Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43 (1986). The courts, critics and drafters of the Federal Rules of Evidence remained deeply concerned with the unscrupulous expert witness who advocated any position. Graham, *supra*, at 43; *see also* FED. R. EVID. 702 advisory committee's note (discussing discretion of trial court).

[17] Brian Kibble-Smith & Arthur W. Hafner, *The Effect of the Information Age*

"expert from afar" surfaced during the eulogy for the so-called "locality rule"[18] and at the conception and infancy of the now accepted "national standard of care."[19] This transition in jurisprudential posture provided that doctors should no longer be judged based upon a local standard of care for the community.[20] Instead, since medical education, training, and sharing of knowledge occur on a nationwide basis, "[e]ach physician may with reason and fairness be expected to possess or have reasonable access to such medical knowledge as is commonly possessed or reasonably available to minimally competent physicians in the same specialty or general field of practice throughout the United States. . . ."[21]

This judicial interpretation was developed further by the Mississippi Legislature's adoption of a medical expert witness statute. The statute provides:

> In any action for injury or death against a physician, whether in contract or in tort, arising out of the provision of or failure to provide health care services, a person may quali-

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on *Physicians' Professional Liability*, 36 DEPAUL L. REV. 69, 77 (1986); *see, e.g.*, MISS. CODE ANN. § 11-1-61 (1991). These statutes adopt various measures aimed at ensuring competency and trustworthiness in traveling experts. Kibble-Smith & Hafner, *supra*, at 77. These statutes range from the more restrictive view adopted in Delaware to the less restrictive approach adopted in Georgia. *Id.* Other states, like Oklahoma, legislatively adopted a national standard of care for all physicians. *See* OKLA. STAT. ANN. tit. 76, § 20.1 (West 1987).

[18] The locality rule refers to the "geographic area" in which the doctor practices. John K. Johnson, Jr., Note, *An Evaluation of Changes in the Medical Standard of Care*, 23 VAND. L. REV. 729, 730 (1970). For the history of the locality rule, see John R. Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DEPAUL L. REV. 408 (1969).

[19] E. Haavi Morriem, *Cost Containment and the Standard of Medical Care*, 75 CAL. L. REV. 1719, 1730 (1987). The advent of standardized medical education, certification and improvements in communication led to the decline in popularity of the locality rule, and the rise in popularity of a national standard of care. *Id.*

[20] Courts and commentators often expressed criticism of the locality rule. *See, e.g.*, Kolesar v. United States, 198 F. Supp. 517, 521 (S.D. Fla. 1961), *modified on other grounds*, 313 F.2d 835 (5th Cir. 1963); Burk v. Foster, 69 S.W. 1096, 1097 (Ky. 1902); Douglas v. Bussabarger, 438 P.2d 829, 837 (Wash. 1968) (en banc); Recent Developments, *Medical Specialties and the Locality Rule*, 14 STAN. L. REV. 884, 887 n.15 (1962).

[21] *Hilbun*, 466 So. 2d at 871.

> fy as an expert witness on the issue of the appropriate medical standard of care if the witness is licensed in this state or some other state, as a doctor of medicine.[22]

The 1990 Mississippi Legislature addressed the medical expert issue in response to the lobbying efforts of the Mississippi Medical Association (M.M.A.).[23] The M.M.A. acted in the interest of Mississippi physicians by responding to several recent cases in which the medical expert witness was a nonphysician.[24] For instance, in *Mississippi Farm Bureau Mutual Insurance Co. v. Garrett*,[25] though not a medical malpractice case, the court certified a chiropractor as an expert witness in the field of chiropractic.[26] The Mississippi Supreme Court, acknowledging that the fields of chiropractic and medicine overlap in certain areas, upheld the trial court's certification of the chiropractor expert.[27] Likewise, in *Thompson v. Carter*,[28] the Mississippi Supreme Court reversed the trial court and ruled that a pharmacologist/toxicologist was qualified to testify for the plaintiff as an expert in a medical malpractice action against the defendant urologist.[29] With these two significant

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[22] MISS. CODE ANN. § 11-1-61 (1991).

[23] Telephone Interview with Clare Hester, Lobbyist, Miss. Medical Ass'n (Nov. 5, 1993).

[24] CAROLYN ELLIS STATON, ELLIS & WILLIAMS MISSISSIPPI EVIDENCE § 702, at 171 (2d ed. 1988) (recognizing that trial judge has discretion on whether to qualify witness as expert); *see also* Kilpatrick v. Mississippi Baptist Medical Ctr., 461 So. 2d 765, 768 (Miss. 1984) (recognizing that in medical malpractice cases, jury comprehension and understanding required expert testimony).

[25] 487 So. 2d 1320 (Miss. 1986).

[26] *Garrett*, 487 So. 2d at 1327. The court's certification allowed the chiropractor to testify as to the injuries sustained by the plaintiff in the accident. *Id.*; *see also* Norville v. Mississippi State Medical Ass'n, 364 So. 2d 1084, 1087 (Miss. 1978) (finding that x-ray interpretation is within chiropractor's area of expertise). *See generally* H.D. Warren, Annotation, *Chiropractor's Competency as Expert in Personal Injury as to Injured Person's Condition, Medical Requirements, Nature and Extent of Injury, and the Like*, 52 A.L.R.2D 1384, 1386-92 (1957).

[27] *Garrett*, 487 So. 2d at 1327. The court held that the interpretation and study of x-rays was common to both fields. *Id.*; *cf.* Hardy v. Brantley, 471 So. 2d 358, 366 (Miss. 1985) (giving trial judge discretion to determine if witness was expert in his field).

[28] 518 So. 2d 609 (Miss. 1987).

[29] *Thompson*, 518 So. 2d at 615. The court held that the toxicologist, through

cases, one can see that the medical lobby certainly felt besieged by the courts. Consequently, the M.M.A. in 1990 looked to the Legislature to provide some barrier to the use of nonphysician witnesses as medical experts.

There is no recorded legislative history in Mississippi to determine exactly how and why the state's medical expert witness statute was sabotaged through the legislative process. However, by piecing together various sources, it is clear that the medical lobby had great expectations of legislative action.[30] The initial drafts of the bill ultimately yielding the Mississippi statute[31] included measuring the Mississippi physician's standard of care on a local, community standard,[32] and provided that only a specialist in the same specialty or sub-specialty could testify against a specialist physician.[33] The medical lobby sought language of exclusion to greatly restrict the medical expert witness to a doctor of medicine, preferably only a "local" doctor as well as only one within the specialty on trial.[34]

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his knowledge, skill, training and education, knew the general standard of care to which physicians adhere. *Id. But see* Sonford Prod. Corp. v. Freels, 495 So. 2d 468, 472 (Miss. 1986) (holding that toxicologist was incompetent to testify regarding medical causation between decedent's employment and his fatal condition), *overruled on other grounds by* Bickham v. Department of Mental Health, 592 So. 2d 96 (Miss. 1991).

[30] Telephone Interview with Hon. Ashley Hines, Former Member of the Mississippi House of Representatives (Nov. 6, 1993).

[31] Mississippi's statute governing testimony given by a medical expert witness is codified at MISS. CODE ANN. § 11-1-61 (1991).

[32] *See* Edward Hume, *The Locality Rule: Enter the Hired Gun*, 12 LEGAL ASPECTS OF MED. PRAC., Apr. 1984, at 6 (explaining purpose of locality rule to protect doctors within community); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 188 (5th ed. 1984) (noting locality rule still exists in number of jurisdictions). *But see* Hall v. Hilbun, 466 So. 2d 856, 873 (Miss. 1985) (discarding locality rule in favor of minimum standard for "competent physicians in the same specialty or general field of practice throughout the United States, who have available to them same general facilities, services, equipment, and options").

[33] KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 13, at 21 (John W. Strong ed., 4th ed. 1992) (noting most courts allow physicians to testify if familiar with standards of specialty even though physician does not practice).

[34] *Cf.* Thompson v. Carter, 518 So. 2d 609, 614 (Miss. 1987) (addressing question of whether expert must possess medical degree).

The proverbial tug-of-war between the medical lobby and the Mississippi Trial Lawyers' Association (MTLA) resulted in a statute with language of inclusion regarding the medical expert witness. The statute provides that "a person *may qualify* as an expert witness . . . if the witness is licensed in this state, or some other state, as a doctor of medicine."[35] In this author's opinion, the statute is not only ambiguous, but also approaches mockery. The statute appears to allow any M.D. from this state or another state, regardless of his "knowledge, skill, experience, training, or education,"[36] to serve as a medical expert witness. Furthermore, section 11-1-61 seemingly does not exclude the nonphysician medical expert witness. Providing that one may qualify as an expert witness if licensed as a doctor of medicine surely does not mean that one "may only qualify" as an expert witness if licensed as a doctor of medicine.[37] The statute, as approved on March 21, 1990, fails to give any distinct guidance and appears to be an open invitation from Mississippi for an unqualified witness to come and speak as to the applicable standard of medical care and any breach thereof. The consolation, though, is that the Mississippi medical expert witness statute appears deprived of any practical significance or effect in view of the Mississippi Supreme Court's ruling in *Hall v. State*.[38]

Justice Robertson, in *Hall*, declared that "[t]he making of rules of evidence to govern trials in our courts is a function at the core of the judicial power. We have exercised that power by adopting the Mississippi Rules of Evidence. . . ."[39] At issue in *Hall* was the Evidence of Child Sexual Abuse Act passed by the Mississippi Legislature in 1986.[40] The Act held admissible substantial hearsay evidence presented in prosection of a child

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[35] MISS. CODE ANN. § 11-1-61 (1991) (emphasis added).

[36] MISS. R. EVID. 702; *see also* FED. R. EVID. 702 (listing factors to consider in determining experts).

[37] *See* MISS. CODE ANN. § 11-1-61 (1991); *cf. Thompson*, 518 So. 2d at 614 (holding that medical expert need not possess medical degree).

[38] 539 So. 2d 1338 (Miss. 1989).

[39] *Hall*, 539 So. 2d at 1339-40.

[40] *Id.* at 1340.

sexual battery case, while under the Mississippi Rules of Evidence such hearsay evidence was completely inadmissible.[41] In declaring the Act unconstitutional, the court held that "[t]he rules and standards by which evidence is adjudged competent for us in a trial are the concern of the department of government where trials take place: the judicial department."[42] If there is any validity to the doctrine of stare decisis, then, in the wake of *Hall*, it is safe to laud the expert witness statute in Mississippi as no more than a political faux pas without any force or effect. The evidentiary turf battle between the court and the legislature belongs to the judicial branch since the rules of evidence apply in that branch's domain, the courtroom, and not on the floor of the House and Senate. Section 11-1-61 of the Mississippi Code is an unconstitutional escapade into the court's rule-making authority. As a practical matter, the Mississippi attorney faced with securing a medical expert witness is well advised to look beyond the language of the statute.[43] The Mississippi practitioner should seek a medical expert based on the expert's familiarity with case law and the Mississippi Rules of Evidence.[44]

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[41] *Id.* at 1340-41.

[42] *Id.* at 1344.

[43] *See* STATON, *supra* note 24, at 173-74 (suggesting that expert's demeanor, level of sophistication, and compensation are factors to consider); Arntz, *supra* note 6, at 1360 nn.8-9 (advising attorneys to check legislation and court decisions within jurisdictions).

[44] Other jurisdictions have passed more commendable statutory restrictions on the qualifying of a medical expert. For example, section 6-5-548 of the Alabama Code provides: "A health care provider may testify as an expert witness in any action for injury to damages against another health care provider based on a breach of the standard of care only if he is a 'similarly situated health care provider'. . . ." ALA. CODE § 6-5-548(e) (1993); *see also* W. VA. CODE § 55-7B-7 (1994). The Alabama statute expressly defines "similarly situated health care provider" in terms relative to both the nonspecialist and the specialist physician. *See* ALA. CODE § 6-5-548(e) (1993).

Similarly, section 13-64-401 of the Colorado Revised Statutes provides:

> No person shall be qualified to testify as an expert witness concerning issues of negligence in any medical malpractice action or proceeding against a physician unless he not only is a licensed physician but can demonstrate by competent evidence that, as a result of training, education, knowledge, and experience in the evaluation, diagnosis, and treat-

Having heralded Mississippi case law as the controlling

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ment of the disease or injury which is the subject matter of the action or proceeding against the physician defendant, he was substantially familiar with applicable standards of care and practice as they relate to the act or omission which is the subject of the claim on the date of the incident. The court shall not permit an expert in one medical subspecialty to testify against a physician in another medical subspecialty unless, in addition to such a showing of substantial familiarity, there is a showing that the standards of care and practice in the two fields are similar. . . .

COLO. REV. STAT. § 13-64-401 (Supp. 1994).

Title 18, § 6854 of the Delaware Code states:

> (a) No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with that degree of skill ordinarily employed in the community or locality where the alleged malpractice occurred, under similar circumstances, by members of the profession practiced by the health care provider; provided, however, that any such expert witness need not be licensed in the State.
>
> (b) Any physician who has been in the active practice of medicine or surgery for at least the past 5 years and who currently practices in the State or within a state contiguous to the State and within a radius of 75 miles of the Capitol of the State shall be presumed to be competent to give expert medical testimony as to applicable standards of skill and care, if it shall be established that the degree of skill and care required of the expert in the locality where the expert practices or teaches is of the same or equivalent standard as the skill and care employed in the community or locality where the alleged malpractice occurred.

DEL. CODE ANN. tit. 18, § 6854 (1989).

Section 147.139 of the Iowa Code provides:

> If the standard of care given by a physician and surgeon . . . is at issue, the court shall only allow a person to qualify as an expert witness and to testify on the issue of the appropriate standard of care if the person's medical . . . qualifications relate directly to the medical problem or problems at issue and the type of treatment administered in the case.

IOWA CODE ANN. § 146.139 (West 1989).

Finally, section 60-3412 of the Kansas statutes states:

> In any medical malpractice liability action . . . in which the standard of care given by a practitioner of the healing arts is at issue, no person shall qualify as an expert witness on such issue unless at least 50% of such person's professional time within the two-year period preceding the incident giving rise to the action is devoted to actual clinical practice in the same profession in which the defendant is licensed.

KAN. STAT. ANN. § 60-3412 (Supp. 1993).

law in evidentiary matters,[45] a detailed analysis of the Mississippi decisions is in order. February 27, 1985, is a landmark date in Mississippi law as it relates to the medical expert witness. On that day the Mississippi Supreme Court rendered its opinion in *Hall v. Hilbun*,[46] thereby rewriting the rules by which the medical expert witness qualifies to testify. With *Hall v. Hilbun*, Mississippi aligned itself with the nationwide trend in adopting a "national standard of care" in medical malpractice cases,[47] finally laying to rest the old and antiquated locality rule.[48]

Consequently, the pre-*Hilbun* line of cases is, for the most part, merely a skeletal framework. In *Sanders v. Smith*,[49] the Mississippi Supreme Court stated that the law "requires only that [the medical expert witness] shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality, and that he shall use ordinary care in applying that learning and skill to the treatment of his patient."[50] In adopting the locality rule, the court cited a prior requirement that there be expert testimony

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[45] *See Hall*, 539 So. 2d at 1344-46. Common law shaped evidentiary rules in Mississippi until the promulgation of the Mississippi Rules of Evidence in 1986. *Id.* at 1345.

[46] 466 So. 2d 856 (Miss. 1985).

[47] *Hilbun*, 466 So. 2d at 873-77; *cf.* Lane v. Otts, 412 So. 2d 254, 257-58 (Ala. 1982) (holding that national standard applied to medical community when establishing requisite standard of care); Morrison v. MacNamara, 407 A.2d 555, 565 (D.C. 1979) (applying national standard of care to hospitals, laboratories, and other health care providers). *But cf.* Campbell v. Oliva, 424 F.2d 1244, 1251-52 (6th Cir. 1970) (retaining locality rule).

[48] *Hilbun*, 466 So. 2d at 870-74. The court advanced the "step forward" taken in King v. Murphy, 424 So. 2d 547 (Miss. 1982), in recognizing the nationalization of medical education and training. *Hilbun*, 466 So. 2d at 870-74.

[49] 27 So. 2d 889 (Miss. 1946).

[50] *Sanders*, 27 So. 2d at 891 (citing Engelking v. Carlson, 88 P.2d 695, 697 (Cal. 1939)). Adoption of the locality rule narrowed the possible application of the doctrine of res ipsa loquitur to situations where the plaintiff could infer through facts and circumstances that the skill possessed by other medical professionals in the region was not used to treat the plaintiff's condition. *Id.*; *cf.* Trindle v. Wheeler, 143 P.2d 932, 934 (Cal. 1943) (allowing plaintiff to invoke doctrine of res ipsa loquitur after defendant introduced evidence of applicable standard of care under locality rule); Whetstine v. Moravec, 291 N.W. 425, 436 (Iowa 1940) (holding that expert testimony is unnecessary when practitioner is "plainly negligent").

in all cases of medical negligence.[51] In *Sanders v. Smith*, a 10-year old patient died suddenly following a tonsillectomy.[52] No expert testimony was offered by the plaintiff mother who, instead, relied on the application of the doctrine of res ipsa loquitur.[53] The court upheld the defendant surgeon's motion for a directed verdict stating that there was no evidence shown as to lack of care and skill.[54] The foregoing rules were reiterated in *Copeland v. Robertson*,[55] where the supreme court affirmed a verdict for the plaintiff against her physician for negligent performance of a hysterectomy.[56] In *Copeland*, both sides did offer local physicians as expert witnesses.[57]

In the 1971 case of *Dazet v. Bass*,[58] the Mississippi Supreme Court first indicated a degree of dissatisfaction with the rigid requirements of the locality rule and the burden it placed on plaintiffs in developing a prima facie case of medical negli-

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[51] *Sanders*, 27 So. 2d at 891-92 (citing Ewing v. Goode, 78 F. 442, 443 (C.C.S.D. Ohio 1897)). The court further qualified this statement by recognizing that an issue "within the common knowledge of laymen" will not require expert testimony. *Id.* at 892.

[52] *Id.* at 889-90.

[53] *Id.* at 890-91. The appellant in *Sanders* relied heavily on Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944), which held that res ipsa loquitur applied when a patient sustained injuries to his arm during an appendectomy. *Sanders*, 27 So. 2d at 891. However, the *Sanders* court noted that the plaintiff in *Ybarra* sustained injuries that were not within the area to be treated by the operation. *Id.*

[54] *Id.* at 890-91. The trial court sustained the defendant's motion for a directed verdict and stated, "[T]o establish liability . . . , there must be a believable probability, rather than a possibility. . . ." *Id.* at 890 (quoting Berryhill v. Nichols, 158 So. 470, 471 (Miss. 1935)).

[55] Copeland v. Robertson, 112 So. 2d 236, 243 (Miss. 1959), *overruled by* Hall v. Hilbun, 466 So. 2d 856, 873 (Miss. 1985).

[56] *Copeland*, 112 So. 2d at 243. In *Copeland*, the patient underwent a hysterectomy as suggested by her physician. *Id.* at 238. The evidence showed that shortly after the operation, the patient gained over twenty pounds, developed a poor complexion, needed glasses, made frequent trips to the bathroom, and had a swollen abdomen. *Id.*

[57] *Id.* at 238-41. Expert testimony offered by the plaintiff came from a physician who practiced in nearby Jackson, Mississippi, and had particular training in the current surgical practices on female organs. *Id.* at 239-40. Testimony offered by the defense was in the nature of general attestations to Dr. Copeland's competency. *Id.* at 241.

[58] 254 So. 2d 183 (Miss. 1971).

gence.[59] The *Dazet* case involved a medical malpractice action by the plaintiff alleging that her gynecologist negligently performed her hysterectomy causing a vesicovaginal fistula.[60] The trial court refused to allow her expert, a New Orleans physician, to testify in the case.[61] The court ruled that the Louisiana physician had no knowledge of the standard of skill and care exercised by physicians in the Jackson area and, therefore, was not competent to testify.[62] Despite affirming judgment for the defendant physicians, the Mississippi Supreme Court tipped its hat to the plaintiff's argument that the locality rule was outmoded. Nevertheless, the court left open the issue concerning the appropriateness of the locality rule.[63] The supreme court, citing *Copeland v. Robertson*, instead declared:

> Negligence cannot be shown in this type of case absent expert medical testimony that defendants failed in some particular respect to use ordinary care and skill, unless the matter in issue is within the common knowledge of laymen. This case involves a highly complex operation about which laymen have no common knowledge.[64]

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[59] *Dazet*, 254 So. 2d at 187-88. The plaintiff's argument was strikingly similar to the argument which would be successfully posed fourteen years later in *Hall v. Hilbun*. The court in *Dazet*, however, was not yet prepared to entirely abolish the locality rule. *Id.* at 187.

[60] *Id.* at 184-85. A vesicovaginal fistula is an abnormal opening between the bladder and the vagina that causes spillage of urine into the vagina. *Id.* at 185-86. The plaintiff claimed that one of the two treating physicians improperly sutured the vaginal wall after surgery, thus causing the opening. *Id.*

[61] *Id.* at 187. Although the doctor was qualified to testify as to the plaintiff's injury, the trial court held steadfast to the locality rule. *Id.*

[62] *Id.*

[63] *Id.* at 187-88. In declining to issue a ruling on the locality rule, the court relied on the fact that the Louisiana physician was dismissed from the stand, and that, consequently, there was no record of the testimony he otherwise would have offered. *Id.* at 187-88. The court concluded that such proof is required since the court must be able to see from the record whether the offered testimony was material and of benefit to the merits of the case, and whether its exclusion was actually harmful and prejudicial to the offeror. *Id.*; *see also* Foster v. Mississippi State Highway Comm'n, 140 So. 2d 267, 270-71 (Miss. 1962) (denying reversal unless record reflected error was harmful and prejudicial to rights of complaining party).

[64] *Dazet*, 254 So. 2d at 187; *see* DeLaughter v. Womack, 164 So. 2d 762, 771 (Miss. 1964) (applying res ipsa loquitur and inferring negligence from facts and

Another significant case dealing with medical expert witness competency in Mississippi is *King v. Murphy*.[65] In *King*, the plaintiff, a logger, sustained a severe laceration of his left leg.[66] He sued his physician for negligent treatment of the leg, which ultimately required amputation.[67] The plaintiff offered as his expert witness an orthopedic surgeon from Florida.[68] The supreme court held, however, that the trial court erred in admitting the Florida physician's testimony.[69] Additionally, the court seized the opportunity to extend and expand the locality rule.[70] It pronounced:

> [W]e hold that the standard of care by which the acts or omissions of physicians, surgeons or specialists are to be judged shall be that degree of care, skill and diligence practiced by a reasonably careful, skillful, diligent and prudent practitioner

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circumstances, thus calling for defendant's rebuttal), *overruled by* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985); Sanders v. Smith, 27 So. 2d 889, 893 (Miss. 1946) (requiring expert testimony unless event which occurred during treatment would appear to reasonable man to be negligent).

[65] 424 So. 2d 547 (Miss. 1982).

[66] *King*, 424 So. 2d at 547. Caused by a chain saw, the sixteen-inch long wound required extensive cleaning and debriding, as well as several layers of stitching. *Id.* at 547-48.

[67] *Id.* at 548-49. Complications arose after treatment, and the defendant attempted to correct the problem using antibiotics, although he found no visible evidence of infection. *Id.* at 548. The plaintiff was subsequently transferred to the Veteran's Hospital in Memphis where he was diagnosed with gangrene subsequently resulting in the amputation of his leg above the knee. *Id.*

[68] *Id.* at 550. The Florida physician cited numerous acts of negligence committed by the defendant. *Id.*

[69] *Id.* at 551. The court concluded that the plaintiff's expert had no contact with or knowledge of the facilities available to the defendant. *Id.*

[70] *Id.* at 550. Perhaps Justice Hawkins influenced the majority by his well-reasoned dissent. Justice Hawkins advocated the abandonment of the locality rule altogether because it was based on the outdated presumption that doctors in a small community did not have the same opportunities and resources as did doctors practicing in a large city. *Id.* at 551 (Hawkins, J., concurring in part, dissenting in part). Justice Hawkins additionally noted the absence of a locality rule in other professions. *Id.* (Hawkins, J., concurring in part, dissenting in part); *see also* Glens Falls Ins. Co. v. Linwood Elevator, 130 So. 2d 262, 268 (Miss. 1961) (viewing fire inspection as profession to be held to national standard); King v. King, 134 So. 827, 829 (Miss. 1931) (holding attorneys to national standard of care).

> in such field of practice or specialty in this state and for a reasonable distance adjacent to state boundaries. An expert witness who is knowledgeable of, and familiar with, the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this state.[71]

Justice Hawkins, concurring in part and dissenting in part, argued that since it is now possible for physicians to stay informed about new methods and practices developed in their particular field, then the locality rule is no longer viable and should be abolished.[72]

Three medical malpractice cases following the rule of *King* were significant in the immediate pre-*Hilbun* era. In *Pharr v. Anderson*,[73] the family of a deceased diabetic patient sued her family practitioner for negligence.[74] The plaintiffs' only expert witness was a board certified surgeon from Jackson, Mississippi.[75] Pursuant to the rule announced in *King*, the court held

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[71] *King*, 424 So. 2d at 550.

[72] *Id.* at 551-53 (Hawkins, J., concurring in part, dissenting in part). Justice Hawkins further averred that the locality rule is only one of the elements to be considered in determining the degree of care and skill which is expected of the average physician in his particular class. *Id.* at 552 (Hawkins, J., concurring in part, dissenting in part); *cf.* King v. Williams, 279 S.E.2d 618, 619-20 (S.C. 1981) (holding that locality rule is no longer sole determinant of degree of care); Pederson v. Dumouchel, 431 P.2d 973, 977-78 (Wash. 1967) (stating that original rationale for locality rule is no longer applicable); Shier v. Freedman, 206 N.W.2d 166, 170-74 (Wis. 1973) (rejecting locality rule as standard to which doctors are held).

[73] 436 So. 2d 1357 (Miss. 1983).

[74] *Pharr*, 436 So. 2d at 1357-58. The emergency room admitted the decedent due to complications associated with her diabetes. *Id.* at 1358. The decedent became hysterical within hours of her admittance to the emergency room. *Id.* Dr. Pharr, the decedent's family physician, was unable to see the decedent at that time so Dr. Wheatley, the decedent's psychologist, consulted with the decedent in the emergency room. *Id.* Dr. Wheatley released the decedent once she gained her composure, as she wanted to go home. *Id.* When the appellant arrived at the hospital, he learned of the decedent's release. *Id.* The appellant, however, failed to look at the decedent's medical chart to determine her course of treatment or diagnosis. *Id.* The decedent's condition deteriorated to the point of death later that day. *Id.*

[75] *Id.* at 1359. Unlike the defendant, the plaintiffs' expert witness had never been involved in the practice of family medicine. *Id.* The plaintiffs' expert testified, however, that there was not a great deal of difference between the standard

that the surgeon was competent as an expert witness in the field of medicine applicable to the case.[76] In addition, the court held that the trial court had not erred in permitting the plaintiffs to call the defendant physician as an adverse witness in order to establish the standard of care.[77]

In *Holmes v. Elliott*,[78] the plaintiff offered an Oklahoma gynecologist[79] as her expert witness in suing her Mississippi gynecologist for the negligent performance of a hysterectomy. The Mississippi Supreme Court reversed the trial court and ruled that under *King* the Oklahoma physician was not competent to testify as to the standard of care in Mississippi.[80]

Finally, in *Kilpatrick v. Mississippi Baptist Medical Center*,[81] the plaintiff sued the hospital, its emergency physician and a referral physician for negligent care of his foot injury.[82] As a result of his failure to secure a medical expert witness, the plaintiff failed to meet discovery deadlines to answer medical expert interrogatories.[83] The case was subsequently dismissed with prejudice.[84] In reaching its conclusion, the court

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of care in family medicine and the standard in his field of medicine, surgery. *Id.*

[76] *Id.* The court stated that an expert witness will not be excluded if he has knowledge of and is familiar with the statewide standard of care in the given field of medicine. *Id.*

[77] *Id.* at 1361.

[78] 443 So. 2d 825 (Miss. 1983), *modified*, Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985).

[79] *Holmes*, 443 So. 2d at 828. The plaintiff's expert witness was licensed to practice medicine in Oklahoma and Georgia, and was presently practicing in Oklahoma City, Oklahoma. *Id.* He testified that he performed over 500 hysterectomies as either a surgeon or assistant surgeon. *Id.*

[80] *Id.* at 830. The court held that an expert who has never practiced in Mississippi and is not familiar with the medical standards prevailing in this state or a similar locality is incompetent to testify as an expert witness. *Id.*

[81] 461 So. 2d 765 (Miss. 1984).

[82] *Kilpatrick*, 461 So. 2d at 766.

[83] *Id.* In response to three interrogatories regarding the plaintiff's expert witnesses, the plaintiff answered that he did not currently have an expert witness but would inform the defendant when he obtained one. *Id.* Presumably, the rule of *King* was a factor in the plaintiff's failure to produce a medical expert witness. *Id.*

[84] *Id.* at 767. When the plaintiff failed to comply with the court order compelling him to answer the interrogatories, the court dismissed his suit with prejudice. *Id.* at 766-67.

restated the now familiar doctrine: "In a medical malpractice action negligence cannot be established without expert medical testimony that the appellee failed to use ordinary skill and care."[85]

The leading case in Mississippi on the medical expert witness and his competency to testify is *Hall v. Hilbun*.[86] *Hilbun* is now the foundation of Mississippi's medical malpractice law. *Hilbun*'s "national standard of care" proclamation rewrote the rules for the medical expert witness.[87] In *Hilbun*, Mrs. Terry O. Hall was admitted to Singing River Hospital in Jackson County, Mississippi, on the morning of May 18, 1978.[88] Her provisional diagnosis was small bowel obstruction, and Dr. Hilbun performed an exploratory laparotomy.[89] Subsequent to the laparotomy performed by Dr. Hilbun on May 20, 1978, Mrs. Hall died the following day.[90] The plaintiff husband sued the surgeon, the hospital, its administrator and several nurses.[91] All defendants except Dr. Hilbun were dismissed prior to trial.[92]

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[85] *Id.* at 768 (citing Hawkins v. Ozborn, 383 F. Supp. 1389 (N.D. Miss. 1974) and Dazet v. Bass, 254 So. 2d 183 (Miss. 1971)); *cf.* Rainey v. Horn, 72 So. 2d 434, 436 (Miss. 1954) (stating that unsuccessful medical treatment does not raise presumption of negligence).

[86] 466 So. 2d 856 (Miss. 1985).

[87] *Hilbun*, 466 So. 2d at 871. The court noted that because medical science is not exact, liability should never be imposed on a physician who has exercised a "bona fide" medical judgment "which turns out . . . contrary to what a qualified medical expert witness *in the exercise of his good medical judgment* would have done." *Id.* Instead, a physician may only incur civil liability "when the quality of care he renders (including his judgment calls) falls below minimally acceptable levels." *Id.*

[88] *Id.* at 860. Since Mrs. Hall's family physician believed she had a surgical problem, he requested that Dr. Hilbun, a surgeon, treat her. *Id.*

[89] *Id.*

[90] *Id.* While Mrs. Hall was in her room recovering from the operation, she began experiencing problems breathing. *Id.* Her husband reported these problems to the nurse who informed him that irregular breathing was not unusual following surgery. *Id.* at 860-61. Later that night Mrs. Hall died of adult respiratory distress syndrome. *Id.*

[91] *Id.* at 860.

[92] *Hilbun*, 466 So. 2d at 860. The Singing River Hospital and its administrators were dismissed from the suit based on the doctrines of sovereign and public immunity. *Id.* at 850 n.1. The nurses were dismissed from the complaint since

The trial court, relying on *Dazet v. Bass*, ruled that the plaintiff's two medical experts, a surgeon and a pulmonologist who were both from Cleveland, Ohio, were not qualified to testify as to the standard of care in Mississippi.[93] Thereafter, the trial court granted defendant's motion for a directed verdict in light of the plaintiff's failure to establish a prima facie case.[94] Hall appealed to the Mississippi Supreme Court.

The majority opinion in *Hilbun* denied eradicating the rule of *King v. Murphy*.[95] To the contrary, Justice Robertson discreetly revealed the secret of *King*: "Generally, where the expert lives or where he or she practices his or her profession has no relevance *per se* with respect to whether a person may be qualified and accepted by the court as an expert witness."[96] Justice Robertson explained that "this is the clear meaning of *King v. Murphy*. . . ."[97]

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they were never individually named in the complaint, nor were they ever served with process. *Id.* at 860.

[93] *Id.* at 863-64. Neither expert witness had any knowledge or experience regarding the medical standards in Mississippi. *Id.* at 864. The trial court held that since they were not qualified as medical experts in Mississippi, then they could not give their opinion as to whether Dr. Hilbun departed from the Mississippi standard of care. *Id.*

[94] *Id.* at 866. Since the testimony of the plaintiff's expert was excluded, the plaintiff could not establish a prima facie case of negligence. *Id.*

[95] *Id.* at 873. The court explained that it was simply smoothing out the rough edges of *King*. *Id.* The court opined that by taking into account the medical standards of adjacent states, *King* already set out a national standard of care. *Id.*

[96] *Hilbun*, 466 So. 2d at 874. The *Hilbun* court went on to state that the place of professional residence is irrelevant as long as it is within this country. *Id.*; *cf.* Radman v. Harold, 367 A.2d 472, 475 (Md. 1977) (holding that qualified medical experts and defendant doctors do not have to be from identical fields of medicine if it can be determined that expert has acquired some knowledge of standards applicable to field of medicine in question); Johnson v. Hermann Hosp., 659 S.W.2d 124, 126 (Tex. Ct. App. 1983) (stating that doctors testifying as experts can be from different cities, states or schools of practice than defendant doctors, so long as they are familiar with subject matter at issue).

[97] *Hilbun*, 466 So. 2d at 874. The supreme court held that the court in *King* rejected the idea that the particular medical community would set the standard by which a medical malpractice case would be judged. *Id.* The court announced that the *King* court's standard of care was only the minimum legal standard with which the expert must be familiar and not the actual standard of care that doctors are held to in malpractice cases. *Id.*; *cf.* Avey v. Saint Francis Hosp. & Sch. of Nursing, Inc., 442 P.2d 1013, 1019 (Kan. 1968) (holding that medical experts

In unmasking *King*, the court honed the current operational rules relating to the medical expert witness.[98] The court stated that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact . . . to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education (or a combination thereof), . . . may testify thereto in the form of an opinion or otherwise."[99] The court reasoned that the question of the competency of the medical expert witness should be treated just as any other expert.[100]

Ultimately, the *Hilbun* court enunciated the three-step procedure for qualifying a medical expert witness in Mississippi.[101] Every trial lawyer dabbling in medical malpractice liti-

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having knowledge of practices in particular localities are qualified to testify as experts even though medical experts never practiced in that locality); McCay v. Mitchell, 463 S.W.2d 710, 717 (Tenn. Ct. App. 1970) (holding that physicians who testify as experts can gain their knowledge of medical standards from sources other than locality where injury occurs).

[98] *Hilbun*, 466 So. 2d at 873-75. The type of facilities, services, equipment and other resources must be considered in determining the standard of care applicable to physicians. *Id.* at 873. The expert witness must at least be familiar with the facilities, resources, services and options available to the physician. *Id.* at 875. The familiarity may be gleaned from a properly phrased hypothetical question. *Id.*; *see* Palmer v. Biloxi Regional Medical Ctr., Inc., 564 So. 2d 1346, 1358 (Miss. 1990) (holding that medical expert witness was properly disqualified where he lacked both knowledge and familiarity with particular hospital or similar facility).

[99] *Hilbun*, 466 So. 2d at 873-74. The court basically stated Rule 702 of the Mississippi Rules of Evidence, but with a slight twist. *Id.* At the time the court rendered its decision in *Hilbun*, Rule 702 was pending before the court for adoption. *Id.* At a minimum, expert medical witnesses are required to assist the trier of fact in medical malpractice cases. *Id.*; *see also* Hammond v. Grissom, 470 So. 2d 1049, 1052 (Miss. 1985) (holding that in medical malpractice cases expert testimony should be allowed if it will assist trier of fact); House v. State, 445 So. 2d 815, 822 (Miss. 1984) (stating that if scientific or technical knowledge will assist trier of fact in understanding evidence, qualified experts may offer expert testimony).

[100] *Hilbun*, 466 So. 2d at 874 (citing Holmes v. Elliott, 443 So. 2d 825, 833 (Miss. 1983) (Hawkins, J., concurring)); *see also* Radman v. Harold, 367 A.2d 472, 475 (Md. 1977) (stating that expert medical testimony has never been treated any differently than other types of expert testimony); Maloney v. Wake Hosp. Sys., Inc., 262 S.E.2d 680, 683 (N.C. Ct. App. 1980) (holding that qualifications of medical experts are judged by same standards as those of other expert witnesses).

[101] *Hilbun*, 466 So. 2d at 874-75.

gation should have this procedure in his or her playbook.

Step One:

> [A] qualified medical expert witness may without more express an opinion regarding the meaning and import of the duty of care . . . given the peculiar circumstances of the case. Based on the information reasonably available to the physician, i.e., symptoms, history, test results, results of the doctor's own physical examination, x-rays, vital signs, etc., a qualified medical expert may express an opinion regarding the conclusions (possible diagnoses or areas for further examination and testing) minimally knowledgeable and competent physicians in the same specialty or general field of practice would draw, or actions (not tied to the availability of specialized facilities or equipment not generally available) they would take.[102]

Step Two:

> Before the witness may go further, he must be familiarized with the facilities, resources, services and options available. This may be done in any number of ways. The witness may prior to trial have visited the facilities, etc., He may have sat in the courtroom and listened as other witnesses described the facilities. He may have known and over the years interacted with physicians in the area. There are no doubt many other ways in which this could be done, but, significantly, we should allow the witness to be made familiar with the facilities (and customs) of the medical community in question via a properly predicated and phrased hypothetical question.[103]

Step Three:

> Once he has become informed of the facilities, etc. available to the defendant physician, the qualified medical expert witness may express an opinion what the care duty of the defendant physician was and whether the acts or omissions of the defendant physician were in compliance with, or fell sub-

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[102] *Id.*

[103] *Id.* at 875.

stantially short of compliance with, that duty.[104]

The court expressed a warning against the unchecked reliance on the mechanics of the three-step process by stating that "not every M.D. is a qualified expert in every malpractice case."[105] It is noteworthy that here the case law is diametrically opposed to and on a collision course with Mississippi's medical expert witness statute.[106] The ambiguous statute apparently would qualify a person as an expert witness if he is merely licensed as a doctor of medicine.[107] *Hilbun* charges the trial judge with ascertaining whether a medical expert witness is, in fact, qualified as an expert.[108] He is called upon to exercise his sound discretion.[109] "Bias, interest and previous experience as an expert in medical malpractice cases" should be exposed by aggressive cross-examination on voir dire and during trial.[110] Consequently, this comment submits that the three-step procedure is, in practice, a four-step process. The

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[104] *Id.* (footnote omitted).

[105] *Id.*; *see* Harris v. Shields, 568 So. 2d 269, 272 (Miss. 1990) (agreeing with *Hilbun* court's warning); *see also* Arntz, *supra* note 6, at 1374 (stating that "ideal" expert witness is one who is from same or similar area as defendant, from same school of medicine as defendant, certified in same area as defendant and participating in clinical practice).

[106] MISS. CODE ANN. § 11-1-61 (1991). The statute states that a "person may qualify as an expert witness on the issue of the appropriate medical standard of care if the witness is licensed in this state, or some other state as a doctor of medicine." *Id.*

[107] Moreover, the court in *Harris v. Shields* concluded that individuals otherwise qualified within the rules of evidence may, despite the lack of medical degree, express opinions which at one time only doctors were qualified to give. *Harris*, 568 So. 2d at 272; *see also* Thompson v. Carter, 518 So. 2d 609, 614 (Miss. 1987) (stating that qualification as expert does not necessarily depend upon education or professional degree).

[108] *Hilbun*, 466 So. 2d at 875; *see also* Smith v. State, 530 So. 2d 155, 162 (Miss. 1988) (stating that decision whether witness qualifies as expert is left to discretion of trial judge); Hardy v. Brantley, 471 So. 2d 358, 366 (Miss. 1985) (concluding that determination of whether witness will qualify as expert lies within discretion of trial judge).

[109] *Hilbun*, 466 So. 2d at 875.

[110] *Id.*; *see also* Arntz, *supra* note 6, at 1376 (stating that opposition's lawyer should attack not only fee payment, but also expert's prior experience testifying and similarity between expert's testimony and expert's own publications).

fourth step is this filter of judicial discretion through which the medical expert witness must pass.

A review of medical malpractice cases in the post-*Hilbun* era reveals that *Hilbun* had a profound effect on the qualifying of a medical expert witness. Subsequent cases have built on the foundation of the *Hilbun* doctrine. The Mississippi Supreme Court, in *Kelley v. Frederic*,[111] stated that "[t]here is no magical form to which a plaintiff's supporting expert opinion must conform, so long as its import is apparent."[112] In *Kelley*, the plaintiff patient offered the deposition testimony of his local treating orthopedist that the initial care of a finger injury by the defendant, a local general practitioner, was "extreme."[113] Additionally, the plaintiff offered his observation of the care the general practitioner provided.[114] The court determined that the patient's observations of medical care were within the parameters of that which a lay person without medical training may be reasonably expected to observe, understand, and remember.[115] The facts in the case reveal that the plaintiff's orthopedic surgeon was not steadfast as an adverse witness against the defendant physician.[116] However, the plaintiff creatively coupled his lay testimony along with the orthopedist's mildly corroborative testimony to secure a reversal of the trial court's grant of summary judgment.[117] The Mississippi Supreme Court noted that no medical expert alone had testified that "given these facts, Dr. Frederic deviated from the minimal standard of care required of physicians, etc."[118] Therefore, the practical rule is that the court may find sufficient medical ex-

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[111] 573 So. 2d 1385 (Miss. 1990).

[112] *Kelley*, 573 So. 2d at 1389.

[113] *Id.*

[114] *Id.* at 1387.

[115] *Id.* at 1388-89; *see also* Williams v. Bennett, 610 S.W.2d 144, 146 (Tex. 1980) (stating that lay person may not make diagnosis, but may give factual testimony as to physical condition of body); CHARLES KRAMER & DANIEL KRAMER, MEDICAL MALPRACTICE 99-100 (5th ed. 1983) (stating that medical expert testimony is not required when matters at issue are of common knowledge).

[116] *Kelley*, 573 So. 2d at 1387-88.

[117] *Id.* at 1389.

[118] *Id.*

pert evidence on which to base a medical malpractice claim by totaling all of the facts, factors, and testimony. The expert in a three-piece suit uttering the magical words does not therefore appear to be a rigid requirement.

Medical malpractice litigators should be on continuous alert to the fact that the plaintiff need not look any further than the defendant himself as a medical expert witness in building a prima facie case. A plaintiff can conceivably establish a case by the defendant doctor's own deposition without other expert testimony. By tactically and masterfully deposing the defendant physician, he can be prodded into essentially admitting the national standard of care in the case at issue and that there was a breach of that standard of care.[119] In its latest pronouncement on the medical expert witness, the Mississippi Supreme Court found just such an admission. In *Drummond v. Buckley*,[120] an aggrieved patient sued his doctors for negligence in the postoperative care of his back surgery.[121] The circuit court disqualified the plaintiff's medical expert witness at the pretrial stage.[122] The lower court granted summary judgment to each of the defendants after concluding that the plaintiff had no prima facie case in the absence of the required medical expert testimony.[123] The supreme court reversed, holding that, although the plaintiff had no medical expert witness, the defendant doctor's deposition statements amounted to a clear admission of the applicable standard of care, thus enabling the plaintiff to avoid summary judgment.[124] Plaintiffs should holster this technique as a fall back

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[119] *See* Davis v. Marshall, 603 S.W.2d 359, 362 (Tex. Civ. App. 1980) (holding that standard of care may be established by defendant-physician); *see also* Keith, *supra* note 4, at 71 (stating that Texas courts have held defendant-physician's admission sufficient to establish standard of care).

[120] 627 So. 2d 264 (Miss. 1993).

[121] *Drummond*, 627 So. 2d at 267.

[122] *Id.* The defense investigation revealed "highly suspect" credentials which the witness refused to explain when questioned. *Id.*

[123] *Id.*

[124] *Id.* at 268-69; *see also* Warner v. Hurt, 834 S.W.2d 404, 407 (Tex. Ct. App. 1992) (stating that error in admission of medical expert's testimony in malpractice action was harmless, since jury heard sufficient evidence from defendant-physician

position, an option in the event the premier expert witness fails to emerge. Likewise, the defendant physician in a medical malpractice action should measure his answers with caution, lest he ironically become the plaintiff's expert witness in the case against him. The court had earlier hinted at this posibility in *Pharr v. Anderson*[125] and restated it in the post-*Hilbun* case of *Cole v. Wiggins*.[126]

This comment is confined to the issue of the medical expert witness in a medical malpractice action, which ordinarily is premised on the theory of negligence. However, the evolving theory of basing a medical malpractice action on lack of informed consent should here be noted as well. To explore this theory in detail is beyond the scope of this comment. However, the noteworthy rule is that medical expert testimony is not required to establish what communications transpired between the doctor and the patient.[127] Communications between doctors and patients, where a fully informed patient consented to the treatment at issue, have been held to be "matters which are within the common knowledge of laymen."[128] In practice, when no medical expert witness is in sight, scrutinize the communications for a possible informed consent claim.[129]

The post-*Hilbun* case law in Mississippi paints the portrait of the competent medical expert witness. Astonishing and perhaps unfair is the fact that in Mississippi a nonphysician may qualify as a medical expert witness in a medical malpractice case.[130] The nonphysician may testify as to whether the physi-

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to establish standard of care).

[125] 436 So. 2d 1357, 1361 (Miss. 1983).

[126] 487 So. 2d 203, 206 (Miss. 1986).

[127] *Cole*, 487 So. 2d at 206 (citing Hammond v. Grissom, 470 So. 2d 1049, 1053 (Miss. 1985)).

[128] *Id.* The court stated that such matters of common knowledge do not invoke the expert testimony requirement. *Id.* (citing *Hammond*, 470 So. 2d at 1053).

[129] *See* Phillips v. Hull, 516 So. 2d 488, 494 (Miss. 1987). The *Phillips* court reasoned that since the patient's and the doctor's affidavits contradicted each other, a jury should decide the issue of informed consent. *See also* Latham v. Hayes, 495 So. 2d 453, 458 (Miss. 1986) (finding that trial court properly directed verdict for defendant doctor on issue of informed consent because plaintiff failed to establish that reasonably prudent patient would have refused surgery even with complete information).

[130] Thompson v. Carter, 518 So. 2d 609, 614 (Miss. 1987). The court stated

cian breached the standard of care.[131] This result may not seem so harsh until the hypothetical is rephrased in a different context: A nonlawyer may testify as to whether the lawyer breached the standard of care in a legal malpractice claim. Unquestionably, such a rule would raise a clamor. In *Thompson v. Carter*, the patient developed a severe allergic reaction to an antibiotic prescribed by a urologist to combat a kidney infection.[132] At trial, the plaintiff proffered the testimony of a pharmacologist/toxicologist who was coordinator of the Regional Poison Control Center for the State of Mississippi.[133] The trial judge directed a verdict in favor of the defendant physician because the plaintiff was unable to produce an expert witness with a medical degree to establish the standard of care for physicians prescribing the culprit drug.[134] Citing *Sonford Product Corp. v. Freels*,[135] the Mississippi Supreme Court ruled that the trial judge erred in disallowing the nonphysician expert's testimony.[136] In *Freels*, the court reversed a circuit

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that the only necessary qualification is that a witness have medical knowledge. *Thompson*, 518 So. 2d at 614; *cf.* Anchor Coatings, Inc. v. Marine Indus. Residential Insulation, Inc., 490 So. 2d 1210, 1217 (Miss. 1986) (stating that Mississippi law required expert to qualify to testify through "knowledge, skill, expertise, training or education").

[131] *Thompson*, 518 So. 2d at 615; *see also* Cornfeldt v. Tongen, 262 N.W.2d 684, 697 (Minn. 1977) (holding that chief nurse anesthetist was qualified to testify as expert even without medical degree); Searle v. Bryant, 713 S.W.2d 62, 64-65 (Tenn. 1986) (finding infectious disease specialist and clinical microbiologist qualified to testify despite fact that witness was not surgeon and did not see patients in private practice).

[132] Thompson v. Carter, 518 So. 2d 609, 611 (Miss. 1987).

[133] *Thompson*, 518 So. 2d at 613. The proffered witness' professional duties included consulting physicians and suggesting treatment for poisoning or for adverse reactions to various drugs. *Id.*

[134] *Id.* at 614. The trial court found that the fields of pharmacology and toxicology differed in the standard of care for the use of drugs and, therefore, refused to allow plaintiff's expert to testify. *Id.* at 613-14.

[135] 495 So. 2d 468 (Miss. 1986), *overruled on other grounds by* Bickham v. Department of Mental Health, 592 So. 2d 96 (Miss. 1991).

[136] *Thompson*, 518 So. 2d at 614-15. *But see* Bell v. Hart, 516 So. 2d 562, 570 (Ala. 1987) (holding that trial court correctly excluded testimony of psychologist and pharmacist as to medical doctor's standard of care in prescribing particular drugs as neither the psychologist nor pharmacist could prescribe those drugs themselves); *cf.* Goodwin v. Harrison, 780 S.W.2d 518, 524-25 (Ark. 1989) (finding

judge's order excluding the testimony of a nonphysician toxicologist in a workers' compensation claim.[137] The *Freels* court reasoned that "the witness" should not be disqualified from testifying because his degree is a Ph.D. instead of an M.D. The Commission's inquiry should be whether the witness is in fact qualified—by knowledge, skill, experience, training or education—not by what degree he holds."[138] Thus, in *Freels* the court initiated the gaffe that unfolded in *Thompson*. Medical knowledge, however acquired, not a medical degree, is the prerequisite for the medical expert witness hurdling the four-step procedure through trial. "It is not the law that only a medical doctor may testify as to the physical symptoms on the human being."[139] This rule, consequently, sweeps in a vast array of potential "medical experts."

In *Mississippi Farm Bureau Mutual Insurance Co. v. Garrett*, an injured automobile passenger sued the host driver's uninsured motorist carrier for stacked benefits.[140] Offered as the plaintiff passenger's expert witness was his treating chiropractor.[141] The trial court certified the chiropractor as an expert in the field of chiropractic and allowed him to testify as to the plaintiff's injury, diagnosis and treatment.[142] The Mis-

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physician employed in field of pharmacology precluded from testifying as expert in field of gynecology since "witness did not demonstrate intimate familiarity with gynecology.").

[137] *Freels*, 495 So. 2d at 472-73.

[138] *Id.* at 473. The court concluded that the witnesses should be allowed to testify regarding the causal relationship between the plaintiff's exposure to chemicals at work and the plaintiff's illness. *Id.*

[139] Police & Fireman's Ins. Ass'n v. Mullins, 69 So. 2d 261, 266 (Ala. 1954). The Alabama Supreme Court opined that a witness might qualify if he possesses special qualifications in a certain field or has knowledge more extensive than that of a layman. *Mullins*, 69 So. at 266.

[140] Mississippi Farm Bureau Mut. Ins. Co. v. Garrett, 487 So. 2d 1320, 1322 (Miss. 1986). The plaintiff sustained injuries after an uninsured motorist struck the vehicle in which the plaintiff was a passenger. *Garrett*, 487 So. 2d at 1322.

[141] *Id.* at 1325. The court noted that the question of whether a chiropractor could serve as an expert witness was one of first impression in Mississippi. *Id.* The court found that the general rule nationwide was that chiropractors could offer opinions on injuries. *Id.*; *see also* Norville v. Mississippi State Medical Ass'n, 364 So. 2d 1084, 1087 (Miss. 1978) (recognizing that interpretation of x-rays was within expertise of chiropractor).

[142] *Garrett*, 487 So. 2d at 1325. The defendant objected to the testimony and

sissippi Supreme Court noted that the chiropractor indeed had testified in areas within the province of the field of medicine.[143] Consequently, the court determined that the fields of medicine and chiropractic overlap to a degree, and thus, the chiropractor's education, experience and training qualified the chiropractor as a witness.[144] In affirming the decision of the lower court, the Mississippi Supreme Court quipped, "[t]he fact that medical doctors may also be so qualified—that medical doctors might even be qualified to give better and more reliable opinions is beside the point."[145]

On first impression in Mississippi, the door would seem to be wide open to nonphysicians and "hired guns" to qualify as medical experts. The four-step procedure for qualifying medical expert witnesses, however, is rendered reliable by the final check valve—the trial judge's sound discretion.[146] The exercise of judicial discretion is evident in many Mississippi cases. In *Boyd v. Lynch*,[147] the parents of a two-year old patient sued their doctor and the hospital for negligence in the death of their son.[148] The trial court allowed the plaintiff's expert physician from Alabama to testify as to the applicable standard of care for physicians, but prohibited him from expressing an opinion on the standard of care for hospitals or nurses in the community where the incident occurred.[149] In contrast to

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asserted that only medical doctors could offer testimony within the field of medicine. *Id.* at 1327.

[143] *Id.*

[144] *Id.* The court held that the chiropractor possessed the requisite level of knowledge and was competent to testify. *Id.*

[145] *Id.*

[146] Hall v. Hilbun, 466 So. 2d 856, 875 (Miss. 1985). The supreme court stated that the determination of the competency of a medical expert witness was not a mechanical procedure, and imposed upon the trial judge the obligation to exercise sound discretion in qualifying a medical expert witness. *Hilbun*, 466 So. 2d at 875.

[147] 493 So. 2d 1315 (Miss. 1986).

[148] *Boyd*, 493 So. 2d at 1316-17. The child died after arriving at the hospital emergency room. *Id.* at 317.

[149] *Id.* at 1319-20. The court found that whether an expert witness could testify was within the discretion of the trial judge. *Id.*; *see also* Reikes v. Martin, 471 So. 2d 385, 393 (Miss. 1985) (finding that trial judge could determine competency

Boyd, the trial court in *Palmer v. Biloxi Regional Medical Center*[150] disallowed the plaintiff's medical expert who had lost his license to practice in several states and had at least twelve medical malpractice suits filed against him.[151] In upholding that disqualification, the Mississippi Supreme Court again proclaimed that the trial judge is vested with the widest possible discretion in determining the qualifications of a witness to testify as an expert.[152] The discretion extends throughout all stages of the case.[153] Unless the court, on appeal, determines that the trial judge abused his discretion, his ruling will remain undisturbed.[154]

The court in *Hammond v. Grissom*[155] determined that the trial court did abuse its discretion in disqualifying the plaintiff's physician expert.[156] Likewise, in *Ladner v. Campbell*[157] the court found that the trial judge erred in not certifying the plaintiff's Louisiana general practitioner to testi-

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of British doctor, who taught at Louisiana State University, to testify though doctor had failed American medical licensing exam three times and had never practiced in Mississippi).

[150] 564 So. 2d 1346 (Miss. 1990).

[151] *Palmer*, 564 So. 2d at 1360. The proffered expert witness had no affiliation with any hospital and he had no hospital privileges. *Id.* at 1358. Additionally, the court stated that the doctor "lacked both knowledge and familiarity with the hospital or similar facility." *Id.*

[152] *Id.* at 1357; *see also* Crawford v. Worth, 447 F.2d 738, 740 (5th Cir. 1977) (noting that trial judge's determination of witness as expert is discretionary and conclusive unless "manifestly erroneous"); Wyeth Lab., Inc. v. Fortenberry, 530 So. 2d 688, 688 (Miss. 1988) (affirming trial judge's decision in qualifying biochemist to testify as expert witness).

[153] *Palmer*, 564 So. 2d at 1357. The court elaborated that "[t]he law empowers a trial judge to determine whether a proffered expert is qualified to testify and does not restrict exercise of this power to the trial stage only." *Id.* In *Palmer*, the disqualification occurred during the summary judgment proceedings, but the supreme court held timing to be of no importance. *Id.*

[154] *Id.* The court acknowledged that exercise of broad discretion was inherent in the determination of an expert's qualifications and noted that only in situations of obvious abuse would the decision be altered. *Id.*

[155] 470 So. 2d 1049 (Miss. 1985).

[156] *Hammond*, 470 So. 2d at 1053. The supreme court ruled that the proffered expert, a Jackson physician for over 40 years, satisfied the *Hall v. Hilbun* criteria, and the trial court should have allowed the expert to testify. *Id.*

[157] 515 So. 2d 882 (Miss. 1987).

fy as to the standard of care for breast cancer treatment in Mississippi.[158] In *Brown v. Mladineo*,[159] the court followed suit holding that the trial court erred in excluding the testimony of a local Jackson surgeon in the plaintiff's case against her gynecologist.[160] In both *Ladner* and *Brown*, the Mississippi Supreme Court reiterated the general rule that a medical expert witness within a particular branch of the medical profession will not be required.[161] This means that, for example, a psychiatrist, *if* he can satisfy the four-step qualifying procedure, could testify in Mississippi as to the standard of care for a neurosurgeon. Similarly, a general practitioner could testify against a medical specialist. The *Brown* court declared that "[m]ost courts allow a doctor to testify if they are satisfied of his familiarity with the standards of a specialty, though he may not practice the specialty himself."[162] In accordance with *Brown*, the *Ladner* court stated that "[t]he fact that an expert is not a specialist in the particular area of medicine involved in the case affects the weight of his testimony, but does not destroy its probative force."[163]

Weight is a vital consideration in securing a medical expert witness. Medical expert testimony should effectuate belief in the jury, and as such, the weight given to the testimony goes to the heart of the case. The credibility, weight, and worth of the testimony of medical expert is determined by the jury.[164] Even

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[158] *Ladner*, 515 So. 2d at 889. On appeal, the Mississippi Supreme Court determined that the excluded testimony of the proffered expert witness would have precluded the directed verdict which the lower court initially granted. *Id.*

[159] 504 So. 2d 1201 (Miss. 1987).

[160] *Brown*, 504 So. 2d at 1202-03. The court held that the surgeon qualified as an expert due to his familiarity with the field of gynecology. *Id.*

[161] *See Ladner*, 515 So. 2d at 889. In *Ladner*, the Mississippi Supreme Court held that the expert need not be an oncologist and that the court should have allowed the proffered general practitioner to testify. *Id.* at 888-89; *see also Brown*, 504 So. 2d at 1202 (concluding that it was not expert's title but his knowledge which qualified him to testify); BROUN ET AL., *supra* note 33, § 13 (stating that courts generally require experts to be of given profession but specialists are not necessary).

[162] *Brown*, 504 So. 2d at 1202.

[163] *Ladner*, 515 So. 2d at 889.

[164] Brown v. McQuinn, 501 So. 2d 1093, 1096 (Miss. 1987). That court held

if the trial court is satisfied that the medical expert witness has adequate knowledge of the applicable standard of care, the jury will make the ultimate determination of credibility.[165] "The greater the discrepancy between the qualifications of the expert witness and those of the defendant specialist, the greater the likelihood that the jury will not find the testimony credible."[166] An expert witness closely matched to the defendant physician is more likely to have credibility with the jury. Thus, in *Hardy v. Brantley*,[167] the court reversed the trial judge's decision in disqualifying the plaintiff's medical expert witness.[168] The Mississippi Supreme Court held that the expert was indeed competent.[169] The jury was left to weigh his credibility. Since the expert witness practiced in the same specialty as the defendant, there is substantial likelihood that the jury assigned greater weight to his testimony.[170]

Regardless of the jurisdiction in which a medical malpractice claim is tried, the ideal medical expert "is one who is (1) from the same or a similar locality as the defendant; (2) actively practicing medicine in a clinical environment; (3) from the same school of medicine as the defendant doctor; (4) familiar with the particular procedure in question, and; (5) certified in the same specialty as the defendant."[171]

In conclusion, a few cautions are in order. Many attorneys

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that the competency of a medical expert's testimony was to be treated just as the testimony of other experts, and thus, the question fell to the jury. *McQuinn*, 501 So. 2d at 1096; *see also* Trapp v. Cayson, 471 So. 2d 375, 380 (Miss. 1985) (concluding that credibility and competency of expert physician's testimony was for jury determination just as with all expert testimony).

[165] Arntz, *supra* note 6, at 1373-74, 1379.

[166] *Id.* at 1379. The tendency is for a jury to give more weight and credibility to testimony from an expert with qualifications similar to the defendant. *Id.*

[167] 471 So. 2d 358 (Miss. 1985).

[168] *Hardy*, 471 So. 2d at 368. The trial court excluded the proffered expert testimony because the expert witness was not practicing in Mississippi. *Id.* at 368.

[169] *Id.* at 369. The Mississippi Supreme Court approved the qualification of the plaintiff's proffered witness authorizing him to testify at the new trial. *Id.*

[170] Arntz, *supra* note 6, at 1379.

[171] *Id.* at 1374. Familiarity may be obtained "through study of journals and books, observation, or practical experience." *Id.*

seek academic physicians as experts. Highly renowned academicians and eminent physicians will carry little weight with the jury if they are so knowledgeable and skillful that they apply a higher standard of care than that which applies to the average, ordinary physician in the community.[172] In outgunning the opposition, don't outgun yourself.

Beware of the "wandering expert."[173] Even if the court qualifies the expert who travels from case to case, the jury may balk. If the jury sees through a witness who was bought, the result will be a verdict in favor of the opponent.[174] Finally, impeach the expert on his qualifications, the number of times he has testified previously in medical malpractice suits, whether he has been sued for medical malpractice, the extent of his current clinical practice and his fee for testifying.[175]

The medical expert witness will make or break a medical malpractice claim. The aforementioned rules of evidence, case law and general principles should offer assistance in recruiting him to testify in a particular Mississippi jurisdiction. May your witness be "ideal."

David L. Meredith, M.D., J.D.

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[172] *Id.*

[173] Medical Professional Societies are wary of members of their profession who spend a disproportionate amount of time testifying as experts. Arntz, *supra* note 6, at 1375.

[174] *Id.* at 1381. Consider the fact that the "wandering expert" may be too mobile and fail the qualification of being familiar with the *local* procedures. *Id.*

[175] *Id.* at 1376. Showing inconsistencies in the expert's testimony from prior trials is the best method of impeaching the expert witness. *Id.*

THE MISSISSIPPI LIMITED LIABILITY COMPANY: A NEW CHOICE FOR MISSISSIPPI

I. INTRODUCTION

On March 15, 1994, Governor Kirk Fordice signed into law the Mississippi Limited Liability Company Act[1] (MLLCA), thereby joining more than thirty-nine states which have adopted this novel business form that provides businesses

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[1] MISS. CODE ANN. §§ 79-29-101 to -1201 (Supp. 1994).

In 1992, the Secretary of State's Business Advisory Group (the Group), consisting of practitioners and academic scholars from around the state, set in motion the creation of the Mississippi Limited Liability Company Act. Initial drafts of the MLLCA were modeled after the Delaware LLC act and early drafts of the American Bar Association's Prototype Act drafted by the Subcommittee on Limited Liability Companies of the Section on Business Law, adapting them to the needs and expectations of Mississippi businesses. This approach soon proved unworkable. Interview with Bryn R. Vaaler, Associate Professor of Law, University of Mississippi School of Law, and Member of Secretary of State's Business Law Advisory Group, in Oxford, MS (Jan. 12, 1994) [hereinafter Vaaler Interview].

With the end of the 1993 legislative session looming and no workable LLC statute in place, the legislature enacted the Mississippi Foreign Limited Liability Company Act (MFLLCA), MISS. CODE ANN. §§ 79-6-1 to -39 (Supp. 1994) (repealed 1994), which provided for the registration and governance of foreign LLCs operating in Mississippi. Vaaler Interview, *supra*. Once this "in road" of LLC legislation was established, the Group began the laborious task of creating a workable statute to govern domestic LLCs.

In drafting the final and present version of the MLLCA, the Group, in essence, created an act which represents a modification of the Mississippi Limited Partnership Act (MsLPA), and, in certain provisions, the Mississippi Business Corporation Act (MsBCA). Guidance in drafting the MLLCA was gleaned primarily from the PROTOTYPE LIMITED LIABILITY COMPANY ACT (draft of July 16, 1992), drafted by the American Bar Association's Section on Business Law [hereinafter "ABA Prototype Act"], the Virginia LLC act, VA. CODE ANN. §§ 13.1-1000 to -1073 (Michie 1994), and various other state LLC statutes. Vaaler Interview, *supra*. Because existing Mississippi law forms the foundation for the MLLCA, practitioners forging through the sometimes unpredictable analysis of new business entities will not be standing on wholly uncharted ground.

With its enactment, the MLLCA supersedes the MFLLCA, with Article 10 of the MLLCA now governing the registration and governance of foreign LLCs operating in Mississippi. *See* MISS. CODE ANN. §§ 79-29-1001 to -1010 (Supp. 1994).

with the opportunity to combine the limited liability of a corporation with the pass-through taxation and operating flexibility of a partnership. The MLLCA offers many important advantages to Mississippi business associations which, before its enactment, were limited to operating under the corporate,[2] partnership[3] or limited partnership forms.[4]

This comment provides an initial overview and analysis of the MLLCA.[5] Section II briefly reviews the development of

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[2] MISS. CODE ANN. §§ 79-4-1.01 to -17.04 (Supp. 1994).

[3] MISS. CODE ANN. §§ 79-12-1 to -85 (1989).

[4] MISS. CODE ANN. §§ 79-14-101 to -1107 (Supp. 1994).

[5] The scope of this comment is restricted to an in-depth discussion and analysis of the MLLCA; limiting treatment of general LLC law and principles to the extent of providing necessary background information to facilitate analysis of particular provisions of the Mississippi Act. As points of comparison, however, continual reference will be made to the prototype acts drafted by the American Bar Association, ABA Prototype Act, *supra* note 1, and the UNIFORM LIMITED LIABILITY COMPANY ACT (draft of May, 1993), drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) [hereinafter "Prototype ULLCA"]. When adopted by their respective organizations, these prototypes will represent the standard uniform LLC acts. Comparison will also be made to the Virginia LLC act, VA. CODE ANN. §§ 13.1-1000 to -1073 (Michie 1994), because of its role in guiding the Group in drafting the MLLCA, and to the Delaware LLC Act, DEL. CODE ANN. tit. 6, §§ 18-101 to -1106 (Supp. 1993), because of the importance Delaware plays in the commercial world. Finally, references will be made to various other states' LLC statutes to provide fruitful comparison of particular provisions in the MLLCA.

With the rapid development of LLC law across the country, a comprehensive list of publications and IRS rulings addressing LLCs would fill the pages of this journal. The leading and most comprehensive treatise on LLCs is LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES (1992), published by Shepards/McGraw-Hill. This treatise is in loose-leaf form, promising up-to-date analysis of this changing area of law. It also provides a sample LLC agreement and a reproduction of all state LLC statutes and the ABA Prototype Act. Another loose-leaf service that provides sample LLC agreements and certificates of formation, along with various other sample forms used in LLC transactions is WILLIAM D. BAGLEY & PHILIP P. WHYNOTT, THE LIMITED LIABILITY COMPANY: THE BETTER ALTERNATIVE (3d ed. 1992). Practitioners, however, should beware of strict compliance with these or other forms which are not tailored to the MLLCA.

For comprehensive law review discussions of LLCs, see Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387 (1991); Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375 (1992); *see also* Susan Pace Hamill, *The Limited Liability Company: A Possible Choice for Doing Business?*, 41 FLA. L.

LLCs in the United States. Section III outlines the MLLCA on a topic-by-topic basis, analyzing key provisions and comparing the MLLCA to Mississippi Corporate and Partnership law as well as to other states' LLC acts. Section IV discusses partnership classification for federal income tax purposes, focusing on tax sensitive elections provided in the MLLCA which, if mishandled, would jeopardize the LLC's pass-through taxation under current regulations. Section V addresses the particular provisions of the MLLCA which govern professionals electing to form LLCs. Finally, Section VI concludes with several issues which may pose problems with use of the LLC entity.

II. BACKGROUND

A. History of LLCs

The first LLC statute adopted in the United States was enacted by the Wyoming legislature in 1977,[6] closely followed

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REV. 721 (1989); Susan Kalinka, *The Limited Liability Company and Subchapter S: Classification Issues Revisited*, 60 U. CIN. L. REV. 1083 (1992); James W. Lovely, *Agency Costs, Liquidity, and the Limited Liability Company as a Alternative to the Close Corporation*, 21 STETSON L. REV. 377 (1992); Marybeth Bosko, Note, *The Best of Both Worlds: The Limited Liability Company*, 54 OHIO ST. L.J. 175 (1993); Curtis J. Braukmann, Comment, *Limited Liability Companies*, 39 KAN. L. REV. 967 (1991); Joseph P. Fonfara & Corey R. McCool, Comment, *The Wyoming Limited Liability Company: A Viable Alternative to the S Corporation and the Limited Partnership?*, 23 LAND & WATER L. REV. 523 (1988); Richard Johnson, Comment, *The Limited Liability Company Act*, 11 FLA. ST. U. L. REV. 387 (1983); Jimmy G. McLaughlin, Comment, *The Limited Liability Company: A Prime Choice for Professionals*, 45 ALA. L. REV. 231 (1993); Sylvester J. Orsi, Comment, *The Limited Liability Company: An Organizational Alternative for Small Business*, 70 NEB. L. REV. 150 (1991). For a discussion of various state LLC statutes, see Scott R. Anderson, *The Illinois Limited Liability Company: A Flexible Alternative for Business*, 25 LOY. U. CHI. L.J. 55 (1993); Bradley J. Sklar & W. Todd Carlisle, *The Alabama Limited Liability Company Act*, 45 ALA. L. REV. 145 (1993); Sharon E. Connaughton, Comment, *The Dawn of the Limited Liability in Virginia: An Analysis of the Statute*, 14 GEO. MASON U. L. REV. 177 (1991); Teresa M. Sebastian, Comment, *The Michigan Limited Liability Company Act: A Viable Alternative for Michigan Businesses?*, 1993 DET. C.L. REV. 151 (1993).

[6] *See* WYO. STAT. §§ 17-15-101 to -136 (1989). In passing the LLC act, Wyoming legislators were interested in creating a new investment tool with which to entice foreign investment. Gazur & Goff, *supra* note 5, at 389. Another goal was to create a business shouldering less tax liability than the Subchapter C corpora-

by Florida in 1982.[7] These statutes created a new business entity which, like a corporation, limited the liability of each of its members,[8] while structuring the entity according to the Internal Revenue Service's regulations for partnership taxation.[9] Despite early interest in the LLC, its growth in the United States was stifled by the Service's 1980 proposed regulation which would have mandated corporate taxation for any entity offering its owners limited liability.[10] In 1988, howev-

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tion, but one which did not base limited liability on loss of control as did the limited partnership. Fonfara & McCool, *supra* note 5, at 524.

At the time of the Wyoming enactment, three other forms of business entities provided attributes similar to the LLC: the partnership association, the "limitada" and the statutory close corporation. The partnership association offered limited liability for its "associates," but did not prosper as a nationally recognized form of business because of the Service's intermittent treatment of the partnership association as a corporation for federal tax purposes. Keatinge et al., *supra* note 5, at 378; *see also* Gazur & Goff, *supra* note 5, at 393-94. The Latin American "limitada" also offered limited liability and partnership tax treatment for its members, but failed to gain acceptance in the United States because of its restricted capital structure and doubts as to whether the U.S. courts would respect its limited liability. Hamill, *supra* note 5, at 722 n.9.

The most widely accepted of these limited liability entities was the statutory close corporation. A close corporation formed according to the Model Statutory Close Corporation Act has certain characteristics similar to the LLC, including limited liability, available limitations on transferability of ownership interests, and ability to provide for dissolution by one or more shareholders. Keatinge et al., *supra* note 5, at 382; *see* MODEL STATUTORY CLOSE CORPORATION SUPPLEMENT (1984), §§ 11, 12, 25, & 33. Even though many close corporations would satisfy the test set out in the Treasury Regulations governing the classification of businesses as partnerships for tax purposes, the Service consistently has ruled that the close corporation could not achieve pass-through taxation because it was incorporated. *Id.*; *see* Gen. Couns. Mem. 37,127 (May 18, 1977) and Gen. Couns. Mem. 37,953 (May 14, 1979), in which the Service announced that as a prerequisite for partnership classification an entity must be an "unincorporated entity." A Mississippi LLC bypasses these limitations.

[7] FLA. STAT. ANN. §§ 608.401 to .471 (West 1994).

[8] *See* FLA. STAT. ANN. § 608.436 (West 1994); WYO. STAT. § 17-15-113 (1989).

[9] *See* Treas. Reg. § 301.7701-2(a) (as amended in 1983); *see also* FLA. STAT. ANN. §§ 608.422, .432, .436, .441 (West 1994); WYO. STAT. §§ 17-15-113, -116, -122, -123 (1989). For analysis of the application of Treas. Reg. § 301.7701-2(a) in LLC tax classification, see *infra* notes 18-24 and accompanying text.

[10] Prop. Treas. Reg. § 301.7701-2, 45 Fed. Reg. 75,709 (1980). After Florida enacted its LLC statute, no other state passed LLC legislation during the remainder of the 1980's. Gazur & Goff, *supra* note 5, at 390; Lovely, *supra* note 5, at 383. Not only was the concept of LLCs slow to expand into other states during

er, the Service issued Revenue Ruling 88-76, which concluded that it would treat an LLC formed under the Wyoming LLC Act as a partnership for federal tax purposes.[11] As a result of Revenue Ruling 88-76, coupled with mounting insistence from accounting professionals seeking limited liability from their colleagues' negligence, LLC enactment sprang to life, rising from only five states with LLC acts in place in 1990 to more than thirty-nine in 1994.[12]

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this time, but few businesses elected to form LLCs in the two states that did provide the option. One year following Florida's enactment, only two LLCs were formed, and only 26 were formed in Wyoming by as late as 1988. Gazur & Goff, *supra* note 5, at 390 n.10.

Heated dissention arose regarding the inconsistency which would be created by taxing the LLC as a corporation. Therefore, the Service withdrew its proposed regulation and initiated a "study project" to determine the LLC's proper tax classification. I.R.S. News Release, IR-82-145 (Dec. 16, 1982). After six years, the Service completed its study, concluding that limited liability alone should not preclude classification as a partnership for federal tax purposes. Announcement 88-108, 1988-32 I.R.B. 60.

[11] Rev. Rul. 88-76, 1988-2 C.B. 360, 360. The Service ruled that an LLC's partnership classification for tax purposes would be determined through application of the standards set out in §§ 301.7701-2 through 301.7701-4 of the Treasury Regulations. *Id.* The regulations establish a four factor test which bases partnership classification on an unincorporated organization exhibiting more "non-corporate characteristics" than "corporate characteristics." *Id.* at 360-61 (citing Treas. Reg. § 301.7701-2(a)(3)). In Ltr. Rul. 90-30-013 (Apr. 25, 1990), the service applied the same four factor standard and classified a Florida LLC as a partnership for federal tax purposes. For a concise discussion of the classification issues, see *infra* notes 18-24 and accompanying text. For particular tax sensitive issues affecting Mississippi LLCs, see *infra* notes 143-93 and accompanying text.

[12] The following 39 state LLC acts have been enacted as of the time of this writing: ALA. CODE §§ 10-12-1 to -61 (Supp. 1994); ALASKA STAT. §§ 10.50.010 to .995 (1994); ARIZ. REV. STAT. ANN. §§ 29-601 to -857 (Supp. 1993); ARK. CODE ANN. §§ 4-32-101 to -1316 (Michie Supp. 1993); COLO. REV. STAT. ANN. §§ 7-80-101 to -1101 (Bradford Supp. 1994); 1993 CONN. PUB. ACTS 93-267; 1994 DEL. LAWS ch. 260, §§ 1 to -36; FLA. STAT. ANN. §§ 608.401 to .514 (West 1994); GA. CODE ANN. §§ 14-11-100 to -1109 (1994); IDAHO CODE §§ 53-601 to -672 (1994); ILL. ANN. STAT. ch. 805, paras. 180/1-1 to 180/60-1 (Smith-Hurd Supp. 1994); IND. CODE ANN. §§ 23-18-1-1 to -13-1 (Burns Supp. 1994); IOWA CODE ANN. §§ 490A.100 to .1601 (West Supp. 1994); KAN. STAT. ANN. §§ 17-7601 to -7652 (Supp. 1993); KY. REV. STAT. ANN. §§ 275.001 to .455 (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. §§ 12:1301 to :1369 (1994); ME. REV. STAT. ANN. tit. 31, §§ 601 to -762 (West 1994); MD. CODE ANN. CORPS. & ASS'NS §§ 4A-101 to -1102 (Supp. 1994); MICH. COMP. LAWS ANN. §§ 450.4101 to .5200 (West Supp. 1994); MINN. STAT. ANN. §§ 322B.01 to .955 (West Supp. 1994); MO. REV. STAT., §§ 347.010 to

B. Tax Advantages of Forming an LLC

The LLC is a non-corporate business entity that provides its owners (known as members) with pass-through taxation and limited liability which is not based on the members' lack of control over the business.[13] Prior to the creation of the LLC, business owners who wished to acquire limited liability and pass-through taxation were restricted to operating a limited partnership or a Subchapter S corporation.[14] Although the

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.187 (1994); MONT. CODE ANN. §§ 35-8-101 to -1307 (1994); NEB. REV. STAT. §§ 21-2601 to -2645 (Michie 1994); NEV. REV. STAT. ANN. §§ 86.011 to .571 (Michie 1994); N.H. REV. STAT. ANN. §§ 304-C:1 to :85 (Supp. 1993); N.J. STAT. ANN. §§ 42:2B-1 to -70 (West Supp. 1994); N.M. STAT. ANN. §§ 53-19-1 to -74 (Michie 1994); N.C. GEN. STAT. §§ 57C-1-01 to -10-07 (1993); N.D. CENT. CODE §§ 10-32-01 to -155 (Supp. 1993); OKLA. STAT. ANN. tit. 18, §§ 2000 to 2060 (West Supp. 1995); OR. REV. STAT. §§ 63.001 to .951 (1994); R.I. GEN LAWS §§ 7-16-1 to -75 (Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 47-34-1 to -59 (1994); TENN. CODE ANN. §§ 48-201-101 to -248-606 (1994); TEX. REV. CIV. STAT. ANN. Art. 1528n, arts. 1.01 to 9.02 (West Supp. 1994); UTAH CODE ANN. §§ 48-2b-101 to -157 (1994); VA. CODE ANN. §§ 13.1-1000 to -1073 (Michie 1994); W. VA. CODE §§ 31-1A-1 to -69 (Supp. 1994); WIS. STAT. ANN. §§ 183.0102 to .1305 (West 1994); WYO. STAT. §§ 17-15-101 to -136 (1989).

Nine other states are currently considering enacting LLC legislation. These states are California (S.B. 469, 1993-94 Sess.), Hawaii (H.B. 863, 17th Legislative Sess., 1st Reg. Sess.), Massachusetts (S.B. 1543, 178th Gen. Assembly, 1993 Sess.), New York (S.B. 27, 215th Gen. Assembly, 1st Sess.), Ohio (S.B. 74, 120th Gen. Assembly, 1993-94 Sess.), Pennsylvania (H.B. 1719, 176th Gen. Assembly, 1993-94 Sess.), South Carolina (H.B. 4283, 1993-94 Statewide Session), Vermont (S.B. 314, 62d Gen. Assembly, 1993-94 Adjourned Sess.) and Washington (H.B. 1235, 53d Legislature, 1994 Reg. Sess.).

[13] *See* Keatinge et al., *supra* note 5, at 379. With this unique blend of corporate and non-corporate attributes, the LLC has been termed by some commentators as a "hybrid" or a "limited partnership in corporate form." Kalinka, *supra* note 5, at 1087.

[14] Kalinka, *supra* note 5, at 1103. In choosing a form of entity, one must consider two types of federal taxation: (1) entity based or "double" taxation, where the business' income is taxed to the business and after-tax income which is distributed to its owners is taxed as personal income to the owner; and (2) conduit or "pass-through" taxation, where the business' income is taxed directly to the owners rather than to the business itself. WILLIAM L. CARY & MELVIN A. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 95 (6th ed. 1988). General partnerships and limited partnerships are afforded pass-through taxation under Subchapter K of the Internal Revenue Code. 26 U.S.C.A. §§ 701-02 (West 1988). Corporations generally are taxed on an entity basis under Subchapter C, saving only certain "qualified small corporations" who elect pass-through taxation under

Internal Revenue Code affords pass-through taxation to corporations under Subchapter S,[15] and to limited partnerships under Subchapter K,[16] LLCs circumvent the restrictive requirements of Subchapter S and the "partial" liability and loss of control suffered by limited partnerships.[17]

The availability of partnership classification for pass-through taxation purposes is one of the primary benefits of the LLC.[18] Under Subchapter K, partnerships are taxed on a pass-through basis, each partner being taxed on the individual

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Subchapter S. ROBERT W. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS §§ 12.20.2 to .3, at 295-96 (1989); *see generally infra* notes 46-52 and accompanying text. A sole proprietorship is not regarded as a separate legal entity from its owners. Therefore, income derived from a sole proprietorship is taxed individually to the proprietor. HAMILTON, *supra* § 13.2, at 303. A complete analysis of the distinctions between corporate and partnership tax is beyond the scope of this comment. For a concise discussion of the differences between pass-through taxation and entity taxation, and the tax consequences of choosing a particular business entity, see *id.* §§ 12.20 to 12.20.3, at 295-98.

Decisions regarding taxation of a new business are only one step in determining the appropriate entity under which to operate. Another primary consideration is whether the owners' liability for the debts and obligations of the business will be limited to the extent of the owners' investment in the business. *Id.* § 13.1, at 301. Sole proprietors and general partners are not afforded this limitation. *See id.* §§ 13.2-13.3, at 303-04; UNIFORM PARTNERSHIP ACT § 15 (1914). Corporations and limited partnerships, on the other hand, generally provide their owners with limited liability. HAMILTON, *supra* § 13.8, at 317; REVISED UNIFORM LIMITED PARTNERSHIP ACT § 303 (1976 with 1985 amendments).

Because sole proprietorships, general partnerships and corporations which do not elect taxation under Subchapter S do not offer a combination of limited liability and pass-through taxation similar to that offered by the LLC, only S-Corporations and limited partnerships will be used for points of comparison with the LLC in this section. For a comprehensive comparison between the corporation, general partnership, limited partnership and sole proprietorship, see HAMILTON, *supra* §§ 13.1-13.4, at 301-07.

[15] HAMILTON, *supra* note 14, § 12.20.3, at 296.

[16] 26 U.S.C.A. §§ 701-761 (West 1988 & Supp. 1994)).

[17] For comparison between the LLC, limited partnership and S-corporation, see *infra* notes 31-52 and accompanying text; *see also* Braukmann, *supra* note 5, at 981.

[18] *See* Kalinka, *supra* note 5, at 1104; *see also* Gazur & Goff, *supra* note 5, at 439-40 (noting that partnership classification is "crucial to the validity of the LLC as an alternative form of business organization."); Keatinge et al., *supra* note 5, at 423-24 & n.344 (recognizing disastrous tax consequences to LLC that is treated as corporation for federal tax purposes).

partner's distributive share of the partnership income,[19] even if income is not distributed.[20] The Service will classify an LLC as a partnership for federal tax purposes where, like the limited partnership, the LLC more closely resembles a partnership than a corporation[21] based upon the corporate characteristics of (1) continuity of life, (2) centralized management, (3) limited liability and (4) free transferability of ownership interest.[22] The Service weighs the corporate characteristics

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[19] 26 U.S.C.A. §§ 701-702 (West 1988).

[20] United States v. Basye, 410 U.S. 441, 447-48 (1973). Unlike corporations, unincorporated businesses incur no income tax; rather, tax accrues against the co-owners of the business "on their distributive shares of the profits." Commissioner v. Doak, 234 F.2d 704, 708 (4th Cir. 1956).

[21] The standard of corporate resemblance as the method of determining an entity's classification was established initially by the United States Supreme Court in Morrissey v. Commissioner, 296 U.S. 344 (1935). In *Morrissey*, the Court identified several corporate characteristics: (1) associates in a joint business enterprise; (2) transacting business for purpose of sharing profits; (3) holding title to property in the business entity's name; (4) centralizing management in representatives of the owners; (5) continual life of the entity beyond the death of the owners; (6) means of freely transferring beneficial interest in the entity without affecting the continual life of the enterprise; and (7) owners' liability limited to the amount of their investment. *Morrissey*, 296 U.S. at 356-59. Under Treas. Reg. § 301.7701-2(a)(1) (as amended in 1993), the Service currently recognizes six characteristics which distinguish a "pure corporation" from a partnership. These six factors are: "(i) associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) limited liability, and (vi) free transferability of interest."

Because both incorporated and unincorporated organizations possess associates and the objective to carry on business to make a profit, the Service does not consider these corporate characteristics in classifying an LLC as a partnership for federal tax purposes. *Id.* § 301.7701-2(a)(3).

[22] Rev. Rul. 88-76, 1988-2 C.B. 360, 360-61 (classifying Wyoming LLC as partnership for federal tax purposes); *see* Treas. Reg. § 301.7701-2(a)(3) (as amended in 1993) (stating that unincorporated associations will not be classified as corporations unless association possesses more corporate than non-corporate characteristics). For analysis and discussion of the elements of a business' organizational structure constituting these corporate characteristics, see *infra* notes 143-93 and accompanying text.

The regulations provide that "other factors" exist which may affect an organization's classification. Treas. Reg. § 301.7701-2(a)(1) (as amended in 1993). In Revenue Ruling 79-106, the Service discussed several corporate factors which it *would not* consider in classifying a limited partnership as a corporation, except to the extent that those factors related to the primary characteristics of a corporation. Rev. Rul. 79-106, 1979-1 C.B. 448, 448; *see* 1 FIFTIETH INSTITUTE ON FEDER-

equally; therefore, an LLC will be classified as an unincorporated organization if it lacks any two of these corporate char-

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AL TAXATION § 8.03[9] (1992). In Rev. Rul. 79-106, the Service advised that it would adhere to the decision of the United States Tax Court in Larson v. Commissioner, 66 T.C. 159 (1976), which held that:

> [Several factors] were not of critical importance for purposes of classifying the partnerships.
> (1) The division of limited partnership interests into units or shares and the promoting and marketing of such interests in a manner similar to corporate securities,
> (2) the managing partner's right or lack of the discretionary right to retain or distribute profits according to the needs of the business,
> (3) the limited partner's right or lack of the right to vote on the removal and election of general partners and the right or lack of the right to vote on the sale of all, or substantially all, of the assets of the partnership,
> (4) the limited partnership interests being represented or not being represented by certificates,
> (5) the limited partnership's observance or lack of observance of corporate formalities and procedures,
> (6) the limited partners being required or not being required to sign the partnership agreement, and
> (7) the limited partnership providing a means of pooling investments while limiting the liability of some of the participants.
>
> Accordingly, . . . the Service will not consider the[se] factors . . . as "other factors" that have significance (independent of their bearing on the six major corporate characteristics) in determining the classification of . . . limited partnerships.

Rev. Rul. 79-106, 1979-1 C.B. 448.

Although the Service has not to date considered the factors other than the four primary corporate factors in the LLC context, it has apparently reserved the right to consider additional factors when classifying LLCs. *See* Edward J. Roche, Jr. et al., *Limited Liability Companies Offer Pass-Through Benefits Without S Corp. Restrictions*, 74 J. TAX'N 248, 250 n.10 (1991); FIFTIETH INSTITUTE ON FEDERAL TAXATION, *supra* § 8.03[9]. *But see generally*, Rev. Rul. 88-76, 1988-2 C.B. 360 (referencing only traditional corporate characteristics in classifying LLC as partnership); Rev. Rul. 94-51, 1994-32 I.R.B. 11 (same); Rev. Rul. 94-30, 1994-19 I.R.B. 6 (same).

State law treatment of the LLC as an unincorporated association is not a factor which the Service considers when classifying the LLC for federal tax purposes. *See* Hamill, *supra* note 5, at 724. State law does, however, determine whether an LLC possesses the corporate characteristics at issue. *Id.* n.19; *see* Treas. Reg. § 301.7701-1(c) (as amended in 1977).

For analysis of issues regarding a Mississippi LLC's classification as a partnership under the current regulations, see *infra* notes 143-93 and accompanying text.

acteristics.[23] By definition, an LLC provides its members with limited liability;[24] thus, pass-through taxation will be attained only if the LLC possesses not more than one of the remaining three corporate characteristics.

1. "Bullet-Proof" v. "Flexible" LLC Statutes

In addressing this critical tax classification issue, states have taken two distinct approaches in drafting LLC legislation. Some states have chosen to create a rigid statutory structure for the formation of LLCs, providing absolute, unalterable provisions which ensure that at least two of the corporate characteristics will not be present.[25] Because this rigid structure assures pass-through taxation under the current regulations, these statutes are referred to as "bullet-proof" statutes.[26] The Service has issued several revenue rulings classifying LLCs formed under these "bullet-proof" statutes as partnerships for federal tax purposes.[27]

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[23] *See Larson*, 66 T.C. at 173-86. Noting this equal weighing of corporate characteristics, the court stated that "[t]his apparently mechanical approach may perhaps be explained as an attempt to impart a degree of certainty to a subject otherwise fraught with imponderables." *Id.* at 172.

[24] Gazur & Goff, *supra* note 5, at 442. An organization has limited liability if "under local law there is no member who is personally liable for the debts of or claims against the organization." Treas. Reg. § 301.7701-2(d)(1) (as amended in 1983). All LLC statutes provide members with limited liability as defined in the regulations. *See, e.g.*, ABA Prototype Act, *supra*, note 1, § 304; Prototype ULLCA, *supra* note 5, § 304; MISS. CODE ANN. § 79-29-305 (Supp. 1994).

[25] Statutes which were drafted to ensure partnership classification for federal tax purposes through mandatory provisions regarding the non-corporate characteristics of restricted transferability of interest and discontinuity of life include: COLO. REV. STAT. ANN. §§ 7-80-702, -801 (West Supp. 1994); NEV. REV. STAT. ANN. §§ 86.351, .491 (Michie Rev. 1991); VA. CODE ANN. §§ 13.1-1040, -1046 (Michie 1993); W. VA. CODE §§ 31-1A-34, -35 (Supp. 1994); and WYO. STAT. §§ 17-15-122, -123 (1989).

[26] "Bullet-proof" statutes are designed to conform to the regulatory configuration set out in Rev. Rul. 88-76, 1988-2 C.B. 360. *See* Connaughton, *supra* note 5, at 194. Thus, partnership classification is assured under these statutes only so long as the Service continues to uphold that decision. *Id.*

[27] *See, e.g.*, Rev. Rul. 93-53, 1993-2 C.B. 312 (holding that "a [LLC] formed and operating under the Florida [LLC] Act is classified as a partnership for federal tax purposes."); Rev. Rul. 93-50, 1993-2 C.B. 586 (West Virginia, same); Rev. Rul. 93-6, 1993-1 C.B. 296 (Colorado, same).

In contrast, other states have elected to provide through their LLC legislation a flexible statutory structure which allows members of an LLC to contractually provide for customized governance and organizational provisions. Appropriately, these statutes are referred to as "flexible" acts. These "flexible" statutes contain "default" provisions pertaining to the tax-sensitive characteristics of continuity of life, centralized management and transferability of interest which, if not altered contractually by the members of the LLC, will ensure pass-through taxation under the current regulations.[28] Because the default provisions may be varied by agreement, these statutes enable an LLC to tailor its organizational structure to that most effective for a particular business[29] without necessarily forfeiting partnership taxation under Subchapter K.[30]

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[28] *See* 1994 DEL. LAWS ch. 260, §§ 24, 30, 32; ILL. ANN. STAT. ch. 805, paras. 180/15-1, 30-5, 35-1 (Smith-Hurd Supp. 1994).

[29] Connaughton, *supra* note 5, at 195. For example, a flexible act allows an LLC with passive investors to provide for free transferability of ownership interest while foregoing centralized management and continuity of life. Under bullet-proof statutes (like Virginia's), requiring unanimous consent of the members for a transferee of interests in the LLC to obtain full ownership rights in the LLC would hinder passive investors' ability to "cash out" of the company. *See* VA. CODE ANN. § 13.1-1040 (Michie Supp. 1994).

[30] Whether the Service treats an LLC formed under a flexible statute as a corporate or non-corporate entity for tax purposes does not rest solely on the provisions of the statute; rather, it will depend on the individual circumstances surrounding each LLC. *See* Treas. Reg. § 301.7701-2(a)(1) (as amended in 1993). An LLC formed under a flexible statute should qualify as a partnership for federal tax purposes provided that it possesses no more than two corporate characteristics under the current regulations. *See supra* notes 13-24 and accompanying text. Because businesses have the ability to alter the "default" structure of the LLC, the Service will not issue a "blanket ruling" classifying all LLCs formed under that statute as a partnership for federal tax purposes. Connaughton, *supra* note 5, at 195. The Service may, however, issue rulings that an LLC formed under the flexible statutes that possess certain corporate characteristics will receive pass-through taxation. *Id.*; *see, e.g.*, Rev. Rul. 94-51, 1994-32 I.R.B. 11 (stating that "[b]ecause of the flexibility accorded by the New Jersey [LLC] Act, a New Jersey [LLC] may be classified as a partnership or as an association taxable as a corporation depending upon the provisions adopted in the [LLC's] articles of organization or operating agreement."); Rev. Rul. 93-38, 1993-1 C.B. 305 (noting numerous provisions in Delaware LLC Act which could be modified by agreement, service ruled that "depending on the provisions of the [LLC] agreement, a Delaware [LLC] can assume the characteristics either of a corporation or of a part-

Until the Service issues a revenue procedure describing how an LLC can satisfy the regulation's corporation resemblance standard,[31] treasury regulations, revenue rulings and private letter rulings released by the Service on the issue of tax classification provide a framework of acceptable business structure that, if followed, should not jeopardize partnership taxation.[32]

2. *Effect of the Omnibus Budget Reconciliation Act of 1993 on Choosing an LLC Form of Entity*

In 1993, Congress passed the Omnibus Budget Reconciliation Act (OBRA), which made drastic changes to the then-existing tax code and put into question the feasibility of pass-through entities as viable forms of business from a purely tax perspective.[33] Pass-through entities gained much favor following the passage of the Tax Reform Act of 1986 for their ability to bypass higher corporate tax rates and distribute profits directly to the business owners, to be taxed at a lower individual rate.[34] After OBRA, the individual tax rate has increased to a

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nership for federal tax purposes").

[31] The Service's LLC revenue procedure should be issued by the end of 1994. Lee A. Sheppard, *NYSBA Tax Section Meeting: LLC Revenue Procedure Coming Soon*, 65 TAX NOTES 159 (Oct. 10, 1994) (reporting speech given by Monte Jackel, IRS Deputy Associate Chief Counsel, to New York State Bar Association Tax Section meeting).

[32] *See, e.g.*, Rev. Rul. 94-51, 1994-32 I.R.B. 11 (classifying LLC as partnership for federal tax purposes where there is no continuity of life or free transferability of management rights); Rev. Rul. 94-30, 1994-19 I.R.B. 6 (same); Rev. Rul. 94-6, 1994-3 I.R.B. 11 (same); Rev. Rul. 94-5, 1994-2 I.R.B. 21 (same); Priv. Ltr. Rul. 94-36-019, 1994 PRL LEXIS 1044 (June 7, 1994) (same); Priv. Ltr. Rul. 94-34-027, 1994 PRL LEXIS 945 (May 31, 1994) (same).

[33] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, *reprinted in* 1993 U.S.C.C.A.N. (107 Stat.) 312.

[34] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, *reprinted in* 1986 U.S.C.C.A.N. (100 Stat.) 2085.

Under the Tax Reform Act of 1986, corporations were taxed at a graduating rate up to 34 percent, *Id.* § 601, while individuals were taxed at a 28 percent flat rate, *Id.* § 101, increasing to 31 percent in 1990. Omnibus Budget Reconciliation Act of 1990, Pub. Law No. 101-508, § 11101, *reprinted in* 1990 U.S.C.C.A.N. (104 Stat.) 1388, 1388-403 to -404. Thus, income taxed on a pass-through basis incurred the lower individual rate. Obviously, from a purely tax perspective, pass-

graduated rate up to approximately forty percent, with the corporate rate not exceeding thirty-five percent.[35] Because closely held businesses possess alternative methods of distributing firm profits to its owners without incurring corporate income tax,[36] OBRA should cause business owners to consider whether a pass-through entity is superior to the corporate form for non-tax reasons.

C. Advantages Over Other Business Entities

1. Advantages Over Limited Partnerships

Since the LLC represents, in great degree, a modification of the limited partnership, the LLC and the limited partnership are virtually indistinguishable in certain regards.[37] In matters regarding formation,[38] finance,[39] transfer of interests,[40] withdrawal of members[41] and dissolution,[42] the LLC

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through taxation offered considerable benefits.

[35] Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13201, 13202, 13221, *reprinted in* 1993 U.S.C.C.A.N. (107 Stat.) 416, 457-59, 461, 477 (codified at 26 U.S.C.A. §§ 1, 11).

[36] Although corporate distributions through dividends are subject to income tax at both the corporate and individual levels, closely held corporations may avoid such double taxation in certain ways. For example, a closely held corporation operated by its principal shareholders may distribute its profits to its owners through salaries and certain performance bonuses rather than through dividends. These salaries and performance bonuses, as opposed to dividends, are deductible and not taxed at the corporate level. Of course, such distributions are subject to scrutiny by the Service, and, if found essentially to be a means of escaping corporation taxation, may be recharacterized as a dividend for corporate income tax purposes. *See generally* Prototype ULLCA, Prefatory Note, at 2.

[37] *See generally*, Keatinge et al., *supra* note 5, at 396-97.

[38] *Compare* MISS. CODE ANN. §§ 79-14-201 to -210 (1989) (formation of limited partnership) *with* MISS. CODE ANN. §§ 79-29-201 to -208 (Supp. 1994) (formation of LLC).

[39] *Compare* MISS. CODE ANN. §§ 79-14-501 to -504 (1989) (financing limited partnership) *with* MISS. CODE ANN. §§ 79-29-501 to -504 (Supp. 1994) (financing LLC).

[40] *Compare* MISS. CODE ANN. §§ 79-14-701 to -705 (1989) (assignment of limited partnership interests) *with* MISS. CODE ANN. §§ 79-29-701 to -705 (Supp. 1994) (assignment of LLC membership rights).

[41] *Compare* MISS. CODE ANN. §§ 79-14-602 to -603 (1989) (withdrawal of general and limited partners) *with* MISS. CODE ANN. § 79-29-307 (Supp. 1994) (with-

possesses no distinct advantage over the limited partnership. Furthermore, both LLCs and limited partnerships that qualify as partnerships under the regulations are taxed under Subchapter K of the Internal Revenue Code on a pass-through basis.[43] The LLC, however, offers two significant non-tax advantages over the limited partnership. Limited partnerships limit the liability of only the limited partner, with the general partner remaining ultimately liable for the debts and obligations of the business.[44] Additionally, the limited partners' limited liability is predicated on relinquishing substantially all control over the business to the general partner.[45] In con-

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drawal and dissociation of LLC members).

[42] *Compare* MISS. CODE ANN. §§ 79-14-801 to -804 (1989) (dissolution and winding up of limited partnerships) *with* MISS. CODE ANN. §§ 79-29-801 to -805 (Supp. 1994) (dissolution and winding up of LLC).

[43] Although the limited partnership is generally classified as a partnership for federal tax purposes, limited partnerships may be taxed as a corporation under certain circumstances. Limited partnerships are subject to the same "corporate resemblance" standard applied to LLCs, whereby a limited partnership that possesses more corporate than non-corporate characteristics is classified as an association taxable as a corporation. Treas. Reg. § 301.7701-2(a)(3) (as amended in 1993); *see* Braukmann, *supra* note 5, at 985, n.123 (discussing applicability of particular characteristics to limited partnerships). Notwithstanding the resemblance test, public trading of limited partnership interests renders corporate taxation. I.R.C. § 7704 (1993).

[44] It is possible, of course, to structure the limited partnership to provide limited liability to all partners by creating a limited partnership which uses a corporation as its general partner. Braukmann, *supra* note 5, at 983; *see* Frigidaire Sales Corp. v. Union Properties, Inc., 544 P.2d 781, 782-83 (Wash. Ct. App. 1975). The individual shareholders of the corporate general partner enjoy limited liability as a matter of corporate law. Braukmann, *supra* note 5, at 983; Fonfara & McCool, *supra* note 5, at 528. The shareholders of the corporate general partner, however, will be subject to corporate taxation on their distributions of the corporate general partner's distributive share of the limited partner's income. *See supra* note 14 and accompanying text. The LLC provides limited liability to all members without such unfavorable tax consequences. Furthermore, the corporate general partner would have to maintain adequate capitalization to avoid piercing of the corporate veil. *See generally*, Prototype ULLCA, prefatory note, at 1.

[45] Under section 79-14-303 of the Mississippi Code, a limited partner's chances of being held liable as a general partner for participation in control of the limited partnership is minimal. MISS. CODE ANN. § 79-14-303 (1989). Section 303(a) of the Mississippi Limited Partnership Act allows limited partners to exercise rights and powers as a limited partner, being held personally liable only where the limited partner exercises control of the business such as would make a third party rea-

trast, the LLC affords each of its members limited liability without discriminating between "general" or "limited" members, and does not restrain any member's right to participate in the management of the company as a contingency for limited liability.

2. Advantages Over S Corporations

Although the resulting tax consequences are similar under Subchapter S and Subchapter K,[46] qualification under Subchapter S severely constrains the structuring of the business. An LLC's structure is limited by Subchapter K requiring management vested in the members only to the extent that the LLC possesses no more than two of the traditional corporate characteristics. Subchapter S, however, requires, among other things, that to qualify for pass-through taxation, a corporation must be a domestic corporation[47] with no more than thirty-five shareholders.[48] Because S corporations may have

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sonably believe that the limited partner was a general partner. *Id.* § 79-14-303(a). Section 79-14-303(b) sets out specific actions allowed limited partners which do not constitute control of the limited partnership. *Id.* § 79-14-303(b).

Providing for a corporate general partner may not, however, fully shield limited partners from liability. In certain situations, limited partners who are also officers or stockholders of the corporate general partner may be held liable as general partners by participating in the control of the corporate general partner. Unlimited liability may be lost where the corporate general partner does not maintain a separate identity from the limited partnership. Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543, 545 (Tex. 1975). Where the business of the limited partnership is the sole business of the corporate general partner, limited partners who exercise control over the corporation may be liable as general partners. *Delaney*, 526 S.W.2d at 546.

[46] Qualified "small business corporations" that make an election under Subchapter S generally will not pay corporate taxes on its earnings. Kalinka, *supra* note 5, at 1104; *see* I.R.C. § 1362 (1993). Corporate earnings and losses pass through to the shareholders of the S corporation. I.R.C. § 1366 (1993).

An in-depth analysis of taxation under Subchapter S is beyond the scope of this comment. For a good comparative analysis of the tax consequences of LLCs and S corporations, see Kalinka, *supra* note 5, at 1104-08. For analysis and discussion of S corporation distributions, see BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS [para] 6.08 (6th ed. 1994); JAMES S. EUSTICE & JOEL D. KUNTZ, FEDERAL INCOME TAXATION OF S CORPORATIONS [para] 9.01-.06 (3d ed. 1993).

[47] I.R.C. § 1361(b)(1) (1993).

[48] I.R.C. § 1361(b)(2)(A) (1993). Section 1361(b)(2)(B) requires that all share-

no more than one class of stock, LLCs possess greater flexibility in capitalization.[49] Furthermore, an S corporation is limited in its investment planning since it cannot own more than eighty percent of the stock of another company.[50] Consequently, an LLC's pass-through taxation under Subchapter K offers preferable flexibility in structuring the ownership and capitalization of a business.

The S corporation, however, does not suffer from the uncertain tax classification issues plaguing the LLC. Because a Subchapter S election is a tax election, a qualified small business does not independently need to meet the classification requirements of section 301.7701-2(a) of the Treasury Regulations.[51] Consequently, a Subchapter S election could be preferable to forming an LLC for those businesses that would naturally fall within the parameters of its "small business corporation" qualifications.[52]

III. THE MISSISSIPPI LLC ACT

A. General

The MLLCA represents a modification of the Mississippi Limited Partnership Act, and in certain provisions, the Mississippi Business Corporation Act. Accordingly, practitioners who are involved in the formation of an LLC in Mississippi will undoubtedly recognize several provisions of the MLLCA which they have encountered in the corporate or limited partnership setting.

The MLLCA is a flexible Act containing certain default provisions which govern the tax sensitive portions of the Act. These so-called "default" provisions are rules set out by the

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holders in an S corporation be individuals or certain trusts or estates as defined under § 1361(c)(2). No shareholder may be a non-resident alien. *Id.* § 1361(b)(2)(C).

[49] I.R.C. § 1361(b)(1)(D) (1993).

[50] I.R.C. § 1361(b)(2) (1993); *see* Kalinka, *supra* note 5, at 1106-07.

[51] *See* HAMILTON, *supra* note 14, § 13.9.3 (recognizing that Subchapter S election "does not affect non-tax corporate attributes.").

[52] *See* I.R.C. § 1361(b) (1993).

Act which govern the conduct of the LLC, its members, and its managers absent an agreement to the contrary by the interested parties in the LLC. If these automatic provisions are not altered contractually by the members/managers, a Mississippi LLC will enjoy pass-through taxation under the current regulations.[53] This flexible structure thus benefits small businesses in Mississippi who wish to form an LLC, in that contractual agreements between members and burdensome formation documentation are not required in order to form a workable business receiving pass-through taxation. The flexibility provided by the MLLCA, however, does allow larger, more sophisticated business ventures to contractually provide for elaborate governance provisions which are tailored for that particular LLC. In doing so, however, organizers must be careful to remain within the constraints of the Treasury Regulations to avoid corporate taxation.

Unlike many early LLC acts which simply created a skeletal framework for operating an LLC,[54] the MLLCA obviously offers a comprehensive and detailed framework for forming and operating the business. This section analyzes the most significant attributes of the MLLCA.

B. Formation

The creation of an LLC under the MLLCA is totally dependent upon the execution of one document: the certificate of formation. Much like a Mississippi limited partnership or corporation, LLC's formed under the MLLCA are created when a "certificate of formation" is filed with the Secretary of State's office.[55] Even in the event of a merger, a certificate of

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[53] For a full discussion of the tax sensitive provisions of the MLLCA, *see infra* notes 143-93 and accompanying text.

[54] The earliest LLC acts usually provided only the most fundamental rules for organizing and governing an LLC. In addition, these acts lacked the flexibility inherent in the Mississippi Act. *See, e.g.*, FLA. STAT. ANN. §§ 608.401 to .471 (1982) (demonstrating this "bare bones" approach); WYO. STAT. §§ 17-15-102 to -143 (Supp. 1994) (same).

[55] MISS. CODE ANN. § 79-29-201(3) (Supp. 1994). The certificate of formation serves much the same purpose as a corporation's articles of incorporation or a

merger analogous to a certificate of formation must be filed with the Secretary of State's office in order to complete formation of the new entity.[56] The certificate of formation serves a somewhat analogous function to articles of incorporation or a certificate of limited partnership in that its chief function is to notify third parties as to the existence of the LLC.[57]

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limited partnership's certificate of limited partnership. *See* MISS. CODE ANN. § 79-4-2.02 (1989) (discussing articles of incorporation); MISS. CODE ANN. § 79-14-201 (1989) (discussing certificates of limited partnership). The requirement of filing in a central state office is a uniform requirement in all state and uniform acts. *See, e.g.*, Prototype ULLCA § 202; ABA Prototype Act, *supra* note 1, § 202; DEL. CODE ANN. tit. 6, § 18-201 (Supp. 1992); VA. CODE ANN. § 13.1-1003 (Michie 1993).

The certificate of formation must state the LLC name, the street and mailing address of the LLC's registered office and agent for service of process, a dissolution date if one has been determined, if management is to be vested in the hands of a manager or group of managers a statement to that effect, and any other matter which the managers or members wish to include. MISS. CODE ANN. § 79-29-201 (Supp. 1994). *Cf.* FLA. STAT. ANN. § 608.407 (West 1993) (requiring contribution and purpose statements); WYO. STAT. § 17-15-107(a) (Supp. 1994) (requiring certificate to contain details of contribution). *But see* VA. CODE ANN. § 13.1-1011 (Michie 1993) (requiring only name, dissolution date, and address of officer and agent in certificate).

The certificate of formation gives third parties constructive notice that an LLC has been formed. MISS. CODE ANN. § 79-29-208 (Supp. 1994). Since the certificate is a public record on file with the Secretary of State's office, any interested person can easily ascertain sufficient information to determine the status and location of the LLC. *Id.* § 79-29-208.

[56] MISS. CODE ANN. §§ 79-29-207, -209 (Supp. 1994). An LLC formed under the provisions of the Act may only merge with another foreign or domestic LLC. *Id.* § 79-29-207(1). In such a merger, the surviving company must file a certificate of merger which acts both to provide information about the surviving LLC and as a certificate of dissolution for the non-surviving LLC. *Id.* This certificate must contain:

> (a) [t]he name and jurisdiction of formation or organization of each party . . . ; (b) [a statement] that a plan or agreement of merger has been approved and executed by each party . . ; (c) [t]he name of the surviving organization . . . ; (d) [t]he future effective date of the merger . . . ; (e) the plan or agreement of merger; and (f) [i]f the surviving organization is a foreign [LLC], a statement that it agrees that to may be served with process in this state. . . .

MISS. CODE ANN. § 79-29-209(7)(a)-(f) (Supp. 1994).

[57] MISS. CODE ANN. § 79-29-201(3) (Supp. 1994). "For all purposes, a copy of the certificate of formation duly certified by the Secretary of State is conclusive evidence of the formation of a limited liability company and prima facie evidence of its existence." *Id.* § 79-29-201(3).

Several commentators have suggested that in addition to providing notice, the certificate of formation serves another important function, this being to act as an "investment contract" between the parties.[58] This investment contract theory is incorporated into the MLLCA to some extent since members and managers may include anything in the certificate which they wish. The idea of an "investment contract" acting as a substantive agreement between members and managers is also supported under the Act in the form of an LLC agreement.[59] As defined by the MLLCA, an LLC agreement is "a written agreement of the members as to the affairs of a limited liability company and the conduct of its business."[60] Given the flexible nature of the Act, the LLC agreement could contain agreements between the parties on issues ranging from how the LLC's business is to be conducted to a dissolution date for the company.[61] Although similar agreements can be included in the certificate of formation if so desired, the LLC agreement often poses a more attractive vehicle to members since, unlike the certificate of formation, the document is not required to be filed at the Secretary of State's office and is

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[58] Prototype ULLCA § 202 and commentary. Proponents of the investment contract idea see the certificate of formation as an agreement between the LLC members and/or managers which controls their actions as well as the actions of the LLC. Drafters of the ULLCA, *supra* note 1, who favored the investment contract approach argued that a certificate of formation closely resembles articles of incorporation, and should thus serve the dual notice and investment contract purpose. *Id. But see* ABA Prototype Act, *supra* note 1, § 202 and commentary (allowing only specified language in the certificate of formation).

[59] MISS. CODE ANN. § 79-29-103 (Supp. 1994). The LLC agreement can be used to control the actions of the LLC in any situation provided "such provisions are not inconsistent with the laws of this state or the certificate of formation." *Id.* § 79-29-306(1).

[60] MISS. CODE ANN. § 79-29-103(g) (Supp. 1994). LLC agreements are binding upon the parties involved, and are enforceable in courts of equity either by injunction or other appropriate relief, including possible dissolution of the LLC. *Id.* § 79-29-306(3)(a).

[61] Keatinge et al., *supra* note 5 at 407-08. As discussed earlier, the MLLCA contains default provisions which control the LLC absent an agreement to the contrary, By using an LLC agreement, these somewhat skeletal rules can be changed into a complete set of regulations which are tailored specifically for the needs of a particular LLC. Keatinge et al., *supra* note 5 at 438.

thus not available to the public.

In addition to the certificate of formation, another technical requirement necessary for the formation of an LLC involves the choosing of a name and name reservation if necessary. The name of an LLC created under the MLLCA must include the words "limited liability company", "LLC", or "L.L.C.".[62] Under the MLLCA, an LLC's name must be distinguishable[63] from that of any other LLC, corporation, or limited partnership whose name is reserved or on record at the Secretary of State's office, absent consent or a final judgment by a court of competent jurisdiction.[64] Although the

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[62] MISS. CODE ANN. § 79-29-104(1)(a) (Supp. 1994). In addition to these positive name requirements, the Act also contains certain restrictions on the words an LLC name may consist of. Under the MLLCA, a company's name cannot contain the words "bank", "banker", "bankers", "banking", "trust company", "insurance", "trust", "corporation", "incorporated", partnership", "limited partnership", or words of similar designation. *Id.* § 79-29-104(1)(d). By prohibiting such words to be used in an LLC name, the Act seeks to prevent third parties dealing with an LLC from becoming confused as to the nature of the entity they are dealing with.

[63] MISS. CODE ANN. § 79-29-104(1)(c) (Supp. 1994). The Mississippi Supreme Court has yet to define what "distinguishable" means under either the corporate or limited partnership statutes. When this issue is addressed, perhaps guidance can be gleaned from other jurisdictions. The Utah Legislature, for example, has devised four minor differences in business names which it considers non-distinguishing. These include:

> (1) The words "corporation", "incorporated", "company", "limited partnership", "limited", "L.P.", "Ltd.", "limited liability company", "L.C.", "L.L.C.", or any abbreviation of these words; (2) the presence or absence of the words or symbols of the words "the", "land", "a", or "plus"; (3) differences in punctuation; and (4) differences in capitalization.

UTAH CODE ANN. § 48-2b-106(6) (Supp. 1994).

Although no definitive answer as to what is "distinguishable" exists, the Secretary of State's office has several informal means which it uses to determine whether a requested name may be granted. Telephone interview with Ray Bailey, Assistant Secretary of State, Corporate Law Division (Nov. 7, 1994). Under this standard, the Secretary of State's office examines the name for a minor variation, however slight, which may differentiate the two names. Bailey Interview, *supra*. The Secretary of State's office also asks two questions: 1. Is the name sufficiently different so as to not cause confusion in this office as well as in the Mississippi Tax Commission's Office?; and 2. Will the name permit accuracy in prosecuting and serving process on a company? Bailey Interview, *supra*. If all three of the above requirements are met, the name should be approved. Bailey Interview, *supra*.

[64] MISS. CODE ANN. § 79-29-104(2)(a), (b) (Supp. 1994). If the Secretary of

Mississippi courts have not defined what constitutes a "distinguishable" name, both the MsLPA and the MsBCA use the term in their respective name selection provisions. By adopting this standard, the MLLCA provides a measure of predictability for practitioners who are familiar with the current standard.

A Mississippi LLC may reserve a name with the Secretary of State's office for a period of 180 days.[65] Although several states allow unlimited successive renewals, Mississippi requires a sixty day waiting period before the name may be renewed.[66] In effect, this provision prevents the monopolization of a name by parties contemplating the formation of a domestic LLC or registration of a foreign LLC in this state.

The MLLCA provisions dealing with formation differ markedly from most other state and model acts in two respects. First, Mississippi is one of few states allowing the formation of a single member LLC.[67] Most experts in the field

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State finds a proposed name to be indistinguishable from one already on file, the LLC attempting to obtain use of the name may solicit consent from the similarly named company or petition a court to rule on the matter in the form of a judgement decree. *Id.* § 79-29-104(2)(a). With the wide spread use of limited partnerships and corporations as well as the anticipated expansion of LLC's, opportunities for conflict will flourish and courts will increasingly be called upon to intervene.

[65] MISS. CODE ANN. § 79-29-105(2) (Supp. 1994). Under the MLLCA, a name may be reserved by (1) any person planning to organize an LLC under the MLLCA, (2) any domestic or foreign LLC which intends to adopt the name, (3) a foreign LLC which intends to adopt the name, or (4) a person intending to organize a foreign LLC and register it in this state. *Id.* § 79-29-105(a)-(d).

[66] MISS. CODE ANN. § 79-29-105(2) (Supp. 1994). Both the Prototype ULLCA and the ABA Prototype Act allow unlimited successive renewals without the requirement of a waiting period. *See* ABA Prototype Act, *supra* note 1, § 104; Prototype ULLCA, *supra* note 5, § 107. The model acts drafters felt the burden of having to refile each time the name reservation expired would provide adequate protection against abuse.

[67] MISS. CODE ANN. § 79-29-201 (Supp. 1994); *see also* ARK. CODE ANN. § 4-32-201 (Supp. 1993) (allowing existence of single member LLCs); TEX. REV. CIV. STAT. ANN. art. 1528n, art. 3.01 (West Supp. 1994) (requiring one organizer and not stating member requirements). The majority of LLC statutes require two or more organizers and two or more members. *See, e.g.*, FLA. STAT. ANN. § 608.405 (West Supp. 1994); LA. REV. STAT. ANN. § 12.1304 (West 1994); WYO. STAT. § 17-15-106 (Supp. 1994). Other bifurcated systems allow only one organizer to suffice

view this as a radical departure from the norm since a single member LLC will almost certainly be denied partnership taxation status. Although the Service has yet to issue any official guidance on the matter, a single member LLC would fail to meet the normal definition of "partnership" as "*two* or more persons to carry on as co-owners a business for profit."[68] Additionally, LLCs created with one member should possess at least three of the four established factors required for taxation as a corporation: limited liability, continuity of life, centralized management, and free transferability of interest.[69] A minority of commentators have suggested that the single member LLC may be organized to lack both continuity of life and centralized management, thus avoiding corporate taxation.[70] This view, however, is not widely held, and is in fact discouraged by the Service.[71]

One advantage to allowing the formation of single member LLCs is that now in addition to being a feasible alternative for limited partnerships and corporations, it may also be formed in the place of a sole proprietorship. By permitting

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but require at least two members upon formation. *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 18-101, 201 (Supp. 1992); VA. CODE ANN. § 13.1-1010 (Michie 1993).

[68] U.P.A. § 6(1) (1914). The Internal Revenue Service has interpreted the word partnership to mean "a syndicate, group, pool, joint venture, or other unincorporated organization." I.R.C. §§ 761(a) (1993); *see also* Commissioner v. Culbertson, 337 U.S. 733, 740 (1949) (discussing need for two or more members in partnership).

[69] *See infra* notes 148-93 and accompanying text for a discussion of these corporate characteristics.

[70] Kenneth L. Harris & Francis J. Wirtz, *Tax Classification of the One Member LLC*, 93 TAX NOTES TODAY 140 (1993). Harris and Wirtz argue that if an LLC does not name a manager to run the business, it should not be classified as possessing centralized management. *Id.* Of course, continuity of life is always lacking since the LLC will dissolve upon the death or withdrawal of its sole member. *Id.*

[71] In addressing a Practising Law Institute Symposium on LLCs on November 8, 1994, Monte Jackel, Internal Revenue Service Deputy Associate Chief Counsel, implicitly warned that although neither the upcoming LLC revenue procedure act or any other publication would address the classification of single-member LLCs, LLC organizers should "not . . . abuse a good thing." 94 TAX NOTES TODAY 220 (Nov. 9, 1994). Organizers should not assume that a single-member LLC will receive pass-through taxation, for the Service could always "revisit" Rev. Rul. 88-76 which initially classified LLCs as partnerships. *Id.*

this, the MLLCA has greatly expanded the possible uses of the entity. Sole proprietors may now weigh the limited liability associated with the entity against disadvantages such as possible corporate taxation in making an informed decision as to which entity better suits his business needs.[72]

Given the underlying purpose of the Act as that of allowing organizers to form an LLC under its default rules and obtain partnership taxation status, it is somewhat disturbing that this default rule, if followed, will result in an almost certain loss of this status. Accordingly, it would appear the purpose of the Act would be better served by requiring two members by default.[73] In this manner, single member LLCs could still be formed by a statement to that effect in the certificate of formation, while at the same time protecting LLC organizers living by the Act's default rules.

A second attribute of the MLLCA distinguishing it from many other state and prototype acts is its use of the "Substantial Compliance Doctrine."[74] This doctrine, widely recognized in both the corporate and limited partnership setting, is intended to relieve the organizers of an entity from personal liability when the business was not formed in strict compliance with statutory formalities.[75] Accordingly, minor errors

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[72] *See supra* notes 37-52 and accompanying text for a comparison of LLCs versus corporations and limited partnerships.

[73] *See* McLaughlin, *supra* note 5, at 253-54. By requiring at least two people to possess legal interests in the company, the entity is more amenable to partnership taxation. McLaughlin, *supra* note 5, at 253-54.

[74] MISS. CODE ANN. § 79-29-201(2) (Supp. 1994). A substantial compliance phrase, such as in the MLLCA, normally allows courts to examine the intent of LLC organizers instead of relying solely on the "four-corners" of a misstated document. ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 12.03(a) at 12:31 (1994). A properly filed certificate of formation should in most cases be determined to have substantially complied with the act's requirements if it holds sufficient information to give creditors and other interested parties notice. *Id.* § 12:32.

[75] David Simon & Deborah Lee, Comment, *The Substantial Compliance Doctrine: Preserving Limited Liability Under the Uniform Limited Partnership Act*, 13 U.C. DAVIS L. REV. 924, 925 (1980). As carried over to the LLC setting, the doctrine's applicability will no doubt be determined on a case-by-case basis. *Id.* at 938.

or slight technical deficiencies in formation of an LLC under the Act should not result in improper formation of the company and should not impose liability on LLC organizers.[76] As long as third parties are put on notice that they are dealing with a valid LLC, and no party suffers any actual loss in reliance on any misstatement or omission in the certificate of formation, compliance with the statutory provisions should be found to be substantial.[77] Organizers of LLCs under the MLLCA should remember, however, that although the doctrine does provide some degree of protection against faulty formation, strict compliance with the Act's requirements remains the only definitive means to achieve limited liability.

C. Purpose and Powers of a Mississippi LLC

Unless restricted in the certificate of formation, an LLC formed under the MLLCA may "carry on any legal business, purpose or activity."[78] This broad empowering provision is limited only in instances where the state legislature has limited certain businesses or industries to the corporate form.[79]

In addition to authorizing this broad scope of activity, the MLLCA also enumerates specific actions in which Mississippi

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[76] *See* Bromberg & Ribstein, *supra* note 74, at 12:32 (analyzing liability in partnership setting); WILLIAM L. CAREY & MELVIN A. EISENBERG, CASES AND MATERIALS ON CORPORATIONS, 140-51 (6th ed. 1988) (discussing pre-formation liability of incorporators in corporate area). Whenever an entity is improperly formed, the danger is that its individual members or organizers, rather than the company, will be held personally liable for its debts and obligations. Since like a limited partnership or corporation an LLC is created according to statutory authority, it follows that organizers should be subject to pre-formation liability in the same manner as partners or incorporators.

[77] Simon & Lee, *supra* note 75, at 938-39.

[78] MISS. CODE ANN. § 79-29-108(1) (Supp. 1994). Following Mississippi corporate law, the MLLCA allows any lawful action to be taken by an LLC. *Id.* Although the majority of state acts follow this broad purpose provision, others restrict LLC activities. *See, e.g.*, COLO. REV. STAT. ANN. § 7-80-103 (Bradford Supp. 1994) (containing restrictive powers provision); R.I. GEN. LAWS § 7-16-3 (Michie 1992) (limiting powers to those of partnership).

[79] In Mississippi, the banking and insurance industries are limited to the corporate form, preventing LLCs from entering this field. *See* MISS. CODE ANN. § 81-3-5 (1972) (limiting banking enterprises to corporate form); MISS. CODE ANN. § 83-19-11 (1972) (limiting insurance industry to corporate form).

LLCs are expressly empowered to engage.[80] These specific powers, covering areas which historically posed problems in corporate law, are illustrative in nature and in no way limit an LLC's authority to act in any matter.[81] Rather, the purpose in corporate law of such specific powers provisions was to attempt to avoid ultra vires problems.[82] Although ultra vires

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[80] MISS. CODE ANN. § 79-29-108(2)(a)-(m) (Supp. 1994). These specific powers include the ability:

> (a) to sue and be sued . . . ; (b) to purchase, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with, real and personal property, and any legal or equitable interest in property, wherever located; (c) to sell, convey, . . . and otherwise dispose of all or any part of its property; (d) to purchase . . . [or] otherwise acquire, own, hold, vote, use, sell, . . . [or] otherwise dispose of, and deal in and with shares, or other interests in, or obligations of, any other entity; (e) to make contracts and guarantees, . . . incur liabilities, borrow money, issue its notes, bonds and other obligations . . . ; (f) to lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment; (g) to be a promoter, partner, member, associate or manager of any . . . other entity; (h) to conduct its business, locate offices and exercise the powers granted by this chapter within or without this state; (i) to have and select employees and agents, define their duties, fix their compensation and lend them money and credit; (j) to pay pensions and establish pension plans, . . . and benefit or incentive plans for any or all of its and its subsidiaries' current or former managers, members, employees and agents; (k) to make donations for the public welfare or for charitable, scientific or educational purposes; (l) to transact any lawful business that will aid governmental policy; and (m) to do any other act, not inconsistent with law, that furthers its business and affairs.

Id. § 79-29-108(2)(a)-(m).

[81] MISS. CODE ANN. § 79-29-108(2)(a)-(m). Historically, conflicts existed as to whether corporations possessed the powers necessary to carry on certain activities such as owning property and executing contracts. *See Trustee's of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) (discussing nature and origin of corporate powers). The specific powers provisions in the MsBCA were enacted to eliminate these concerns and should apply equally well in an LLC setting.

[82] For a full discussion of the ultra vires doctrine in Mississippi, see Bryant Const. Co. v. Cook Const. Co., 518 So. 2d 625 (Miss. 1987); North Miss. Sav. & Loan Ass'n v. Confederate States Sav. & Loan Ass'n, 166 So. 2d 119 (Miss. 1964); Eden Drainage Dist. v. Swaim, 55 So. 2d 439 (Miss. 1951); Ketcham v. Mississippi Outdoor Displays, 33 So. 2d 30 (Miss. 1948). For a general discussion of the evolution of the ultra vires doctrine see David A. Kulwicki, Comment, *Amalgamated Sugar: The Auspicious Return of the Ultra Vires Doctrine*, 49 OHIO ST. L.J. 841 (1988); David P. Wohabe, Chemical Bank v. Washington Public Power Supply

is a corporate doctrine, no compelling reason exists as to why it could not be used against an LLC which acted in a manner outside the scope of its powers. Thus, the inclusion of these powers in the MLLCA is an attempt to forestall such an action. In addition, the specific powers provision of the Act helps define what constitutes the "purpose of . . . business and affairs" under provisions dealing with member/manager agency power, hopefully preventing the company from being bound by actions of its agents which are outside the scope of their powers.[83]

D. Management of a Mississippi LLC

The MLLCA, by default, vests management in the hands of the LLC members.[84] This provision of the Act seeks to avoid the corporate characteristic of centralized management by dispersing control among the members in a manner similar to that of a general partnership. In such a member controlled LLC, the Act by default institutes a per capita voting approach where each member exercises one vote on issues to be voted upon by the members.[85] Although a pro rata system of voting based on capital contributions allows members to exercise control commensurate with their interest in the company, a per capita system eliminates the need to determine each members capital percentage before every vote.[86] This per ca-

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System: *The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations*, 69 CORNELL L. REV. 1094 (1984); Ebere Osieke, *The Legal Validity of the Ultra Vires Decisions of International Organizations*, 77 AM. J. INT'L L. 239 (1983).

[83] MISS. CODE ANN. § 79-29-303(1) (Supp. 1994).

[84] MISS. CODE ANN. § 79-29-302 (Supp. 1994). Of all states which have enacted LLC legislation, only one requires control to be placed in the hands of managers. *See* COLO. REV. STAT. ANN. § 7-80 401 (Bradford Supp. 1994) (having mandatory requirement for manager control).

[85] MISS. CODE ANN. § 79-29-304(1) (Supp. 1994).

[86] Several states disagree with the rationale underlying the per capita approach, believing voting power should be equal to each members amount of capital contributions. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-302 (Supp. 1992); MINN. STAT. ANN. § 322B.356 (West Supp. 1994); VA. CODE ANN. § 13.1-1022 (Michie 1993); WYO. STAT. § 17-15-116 (1989).

Although the MLLCA default rule institutes a per capita approach, under §

pita system thus appears to better fulfill the MLLCA's purpose of protecting small, unsophisticated organizers who are without the funds or inclination to draft lengthy LLC agreements, as these are the very companies which may confront problems in determining and maintaining capital contribution accounts.

Where the LLC is member controlled, "every member is an agent of the limited liability company, for the purpose of conducting its business and affairs, and . . . may bind the [company]" by his actions.[87] Liability imposed on the LLC by actions of its members in this manner may be avoided, however, provided the LLC meets a two-prong test set forth in the Act. If a member had, in fact, no authority to bind the LLC *and* the party dealing with that member "had knowledge of that member's lack of authority", the LLC will not be bound.[88] Absent proof of these two factors, actions of mem-

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79-29-304(3) of the Act members are free to create different classes of groups of voting similar to that of shareholders in a corporation. MISS. CODE ANN. § 79-29-304(3) (Supp. 1994). This provision could be used to keep control of the LLC in the hands of a small group of members, especially during times when the LLC is looking to expand and add new members.

[87] MISS. CODE ANN. § 79-29-303(1) (Supp. 1994). Although this provision seemingly grants unlimited power to members to bind the LLC, this agency power is restricted somewhat. Under the Act, an LLC agreement may "regulate . . . the affairs of the limited liability company, the conduct of its business, and the relations of its members." *Id.* § 79-29-306(1). By restricting in the LLC agreement the broad authority given to its members, an LLC may act to protect itself against liability in many instances.

[88] MISS. CODE ANN. § 79-29-303(1) (Supp. 1994). The first prong of the test, whether the member had "in fact" no authority clearly indicates a lack of actual authority by that member. The second prong, however, is more ambiguous. Given the language of the statute, it is unclear as to whether the knowledge required on the part of the third party dealing with the member means that actual knowledge is required or whether constructive knowledge will suffice. Clearly there is a disparate effect on the LLC depending upon which approach is taken. For example, if an LLC is manager controlled, a statement to this effect must be contained in the certificate of formation. *Id.* § 79-69-201(1)(d). Since this document is a public record on file with the Secretary of State, this should constitute constructive notice to anyone dealing with the LLC that a member acting solely in this capacity cannot bind the LLC. If actual notice is required, however, this statement would not be adequate to release the LLC from liability. Absent clarification by the Legislature, this is a question which the Mississippi courts will undoubtedly be called upon to solve in the future.

bers will be binding upon the LLC, even if such acts are to the company's detriment.[89]

Organizers of a Mississippi LLC are free under the Act, however, to vest control solely in the hands of a manager or group of managers.[90] In doing so, the pendulum swings away from a decentralized, partnership style of governance to a more restrictive corporate form of control. In a manager-controlled company, each manager is an agent of the company for "the purpose of its business and affairs" and can bind the LLC in acts "apparently carrying on in the usual way the business . . . of the [LLC]. . . ."[91] Therefore, only managers possess the inherent authority to act on the LCC's behalf; no one acting solely in the capacity of a member possesses the authority to bind the LLC.[92] Potential problems exist where members purportedly acting on behalf of the LLC enter into agreements with third parties. One possible solution which

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[89] MISS. CODE ANN. § 79-29-303(1) (Supp. 1994). If a member acts to intentionally harm the LLC or its members, even if such action falls within the member's stated powers, such member can be held liable for his actions. *Id.* § 79-29-403(b). Although this provision does not address whether such an intentional act will free the LLC from agreements entered into by that member on its behalf, it does seem to allow a suit by the LLC against the member to recover damages for any harm caused. *Id.*

[90] MISS. CODE ANN. § 79-29-302 (Supp. 1994). Although managers may be instituted upon the formation of the LLC, they may also be elected by a majority of members at anytime unless otherwise restricted in the certificate of formation of LLC agreement. *Id.* § 79-29-401(4). Vacancies among the ranks of managers are filled in the same manner. *Id.* § 79-29-401(5). The MLLCA contains no qualification requirements which prospective managers must meet, leaving this subject to the discretion of LLC members. *Id.* § 79-29-401(2). In fact, unless otherwise agreed, managers need not even be residents of Mississippi or members of the LLC. *Id.*

[91] MISS. CODE ANN. § 79-29-303(1) (Supp. 1994). This requirement of "apparently carrying on in the usual way the business . . . of the [LLC]" is common to all state acts, and helps to prevent actions by members or managers which are clearly outside the scope of their powers from binding the LLC.

[92] MISS. CODE ANN. § 79-29-303(2)(d) (Supp. 1994). The phrase "solely in the capacity as a member" leaves the possibility open that a member may indeed bind the LLC. The most obvious instance of this occurs when a member is also a manager of the LLC. This may also occur, however, if the member is delegated the actual authority either by a manager or the LLC to act as an agent on behalf of the company concerning a certain matter. In either instance, the member is not acting solely in a member capacity and may bind the LLC.

has been adopted in other jurisdictions is to require a list of the names and addresses of managers to be contained in the certificate of formation.[93] Although this is not required under the MLLCA, it is permitted.[94] The inclusion of such a provision in the certificate of formation would act to provide notice to third parties concerning the identity of managers. If a third party finds, after examining the certificate of formation, that they are not dealing with a manager, they will be alerted to the possibility that the person possesses no authority to act on the LLC's behalf. Given these considerations, careful drafters should include a list of managers and their respective addresses in the certificate of formation whenever the LLC is to be manager controlled.[95]

Under the MLLCA, managers are subject to a duty of care where managerial duties must be discharged in "good faith, with the care of an ordinarily prudent person . . . , and in a manner he reasonably believes to be in the best interests of the [LLC]."[96] The drafters of the MLLCA chose not to adopt a corresponding duty of loyalty provision which acts to limit

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[93] *See, e.g.*, ARIZ. REV. STAT. ANN. § 29-632.A6 (West Supp. 1993); NEV. REV. STAT. ANN. § 86.161(2) (Michie 1994); UTAH CODE ANN. § 48-2b-116(1)(f) (Michie 1994); WYO. STAT. § 17-15-107 (1989).

[94] MISS. CODE ANN. § 79-29-201(1)(e) (Supp. 1994). The certificate of formation may contain any information which the organizers choose to place in it. *Id.*

[95] The chief purpose of the MLLCA is to provide a flexible act complete with certain default rules which, if followed, acts to insure partnership taxation and provide limited liability. As contemplated by the drafters of the Act, such persons following the MLLCA default rules would typically be small, unsophisticated businesses. Given the Act's overall protection of these type LLC organizers, a requirement that the certificate of formation contain both managers names and addresses would seem consistent since it would help inform persons dealing with an LLC of who possesses power to bind the company. Accordingly, an amendment to the MLLCA inserting this requirement should only add to the Act's inherent protection of small business.

[96] MISS. CODE ANN. § 79-29-402(1)(a)-(c) (Supp. 1994). Managers in fulfilling their duties are entitled to rely on opinions, reports or other information provided by other managers, various professionals such as attorneys or accountants, and committees of managers of which they are not a member provided the manager reasonably believes in their competence. *Id.* § 79-29-402(2)(a)-(c). Decisions based on one or more of these sources should fulfill duty of care requirements even if the information provided is inaccurate. *Id.*

transactions between the corporation and its directors when conflicts of interest are possible.[97] Members and managers under the MLLCA may conduct transactions with the LLC in the same manner as could a non-affiliated person, subject only to any restrictive provisions incorporated by the LLC's organizers or members in the certificate of formation or LLC agreement.[98] Therefore, organizers who wish to lessen the possibility of self-dealing on the part of members and managers at the LLC's expense should clearly distinguish between permitted and prohibited transactions, in effect contractually creating a duty of loyalty applicable to that specific LLC.

Lastly, under the MLLCA default rules, the position of a

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[97] Although the MLLCA sets out no duty of loyalty requirements for members or managers, both corporate and partnership law do contain such duties. Since the purpose of a "duty of loyalty" is to protect an entity from abuse at the hands of its managers or officers, a need which should be addressed in the LLC setting, it cannot be inferred that no duty of loyalty exists at all. When courts in Mississippi do address this problem, they will almost certainly go to analogous corporate and partnership law.

In Mississippi, duty of loyalty in the corporate setting is discussed in depth in the case of *Omnibank v. United Southern Bank*, 607 So. 2d 76, 90-91 (Miss. 1993). In *Omnibank*, this duty is described as "fiduciary in nature . . . ", coming into play most often where "the officer is interested personally in a matter effecting the corporation." *Omnibank*, 607 So. 2d at 90. Although such corporate law is not binding on LLCs, this case along with others should play a role in establishing the limits to which members and managers may go in dealing with the LLC. *See* Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328 (Miss. 1979) (stating Mississippi position on usurpation of corporate opportunity); *see also* Lincoln Stores v. Grant, 34 N.E.2d 704 (Mass. 1941) (discussing corporate opportunity); Globe Woolen v. Utica, 121 N.E. 378 (N.Y. 1918) (stating to overcome conflict of interest (1) contract must be fair, and (2) must be approved by majority of disinterested board).

As defined in the partnership area, duty of loyalty concerns are equally important. Partners owe each other the "duty of finest loyalty" to act on the behalf of each other and the partnership. Meinhard v. Salmon, 164 N.E. 545, 545 (N.Y. 1928). In *Meinhard*, the distinguished jurist Justice Cardoza held that partners are "held to something stricter that the morals of the market place." *Meinhard*, 164 N.E. at 546. Although not as well defined as in the corporate setting, obviously the duty of loyalty among partner acts to restrict actions of self-interest by partners. Accordingly, until the Legislature or Mississippi courts create a duty of loyalty applicable to LLCs, these two analogous bodies of law will provide the best interpretation of which duties are owed the LLC by its members and managers.

[98] MISS. CODE ANN. § 79-29-109 (Supp. 1994).

manager may be a tenuous one. Absent agreement to the contrary, managers may be removed with or without cause at anytime upon a majority vote of the members.[99] This provision is generally altered in most manager controlled LLCs since if it remains in place, ultimate control of the LLC obviously remains in the hands of the members, possibly frustrating in part the very reason for instituting manager control.

E. Finances

1. Contributions

Consistent with the majority of uniform and state acts, the MLLCA allows contributions to an LLC in the form of "cash, property, services rendered, or a promissory note or other obligation to contribute cash or property or to perform services."[100] Before a promise of contribution under the Act will be found enforceable, however, such promise must be in writing.[101] Although some commentators believe such a writing requirement will frustrate the understanding of an unambiguous oral agreement in a small, informal LLC, certain perceived statute of frauds problems override these concerns.[102] Such a promise to contribute capital to the LLC remains enforceable against the member even if he is unable to perform due to death or other disability, thus rendering the member's estate or guardian responsible for fulfilling this obligation.[103]

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[99] MISS. CODE ANN. § 79-29-401(b) (Supp. 1994).

[100] MISS. CODE ANN. § 79-29-501 (Supp. 1994).

[101] MISS. CODE ANN. § 79-29-502(1) (Supp. 1994); *see also* ABA Prototype Act, *supra* note 1, § 502 (requiring writing before promise is binding); VA. CODE ANN. § 13.1-1027 (Michie 1993) (same).

[102] Under the Mississippi statute of frauds, certain agreements must be in writing before courts will deem them enforceable. MISS. CODE ANN. § 15-3-1 (1972). Two agreements set forth in the statute requiring writings involve "any contract for the sale of lands, tenements, or hereditaments" and "any agreement which is not to be performed within the space of fifteen months from the making thereof." *Id.* § 15-3-1(c), (d). Since the MLLCA allows transfers of property and promises to contribute to act as valid capital contributions, areas covered under the statute of frauds, a writing requirement is necessary to protect the LLC's interests. MISS. CODE ANN. § 79-29-502(1) (Supp. 1994).

[103] MISS. CODE ANN. § 79-29-502(2) (Supp. 1994). If a member fails to make a

Although promises to contribute capital are normally strictly enforceable, members may be released or "compromised" from this obligation by a unanimous vote of other LLC members.[104] Financial institutions, however, which have advanced money to the LLC based on its capital adequacy are still entitled to rely on this promise.[105] Such lenders are not prevented from enforcing the prior contribution obligation and possess the same rights of recovery which the LLC held toward the member prior to the compromise.[106] This requirement thus protects a lender's interest in the company and should make the LLC a more attractive investment for a financial institution.

Contributions to the LLC also may play a role in the determination of distribution of earnings. Although the MLLCA leaves the distribution of profits/losses to the discretion of the LLC's organizers or members, if no method is stated in the certificate of formation or LLC agreement profits and losses are to be distributed on a pro rata basis according to the value of each member's contributions to the LLC.[107] Some commen-

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contribution as required, several consequences may occur. If an obligation in the form of property or services is defaulted upon, the LLC has the option to force the member to substitute an equivalent amount of cash in its place. *Id.* § 79-29-502(2). Also, if a member fails to make any required contribution, the LLC may impose penalties upon the member in any form or amount set out in the certificate of formation or LLC agreement. *Id.* § 79-29-502(4).

[104] MISS. CODE ANN. § 79-29-502(3) (Supp. 1994).

[105] *Id.* § 79-29-502(3). The limited liability associated with the LLC comes into play in the event the LLC goes bankrupt, has a judgement levied against it, or whenever any other liability imposing event occurs. In such a case, the members and managers are liable only to the extent of their capital contributions. Since capital contributions may consist of a promise or other obligation, creditors may have an enforceable claim against a member for these contributions. *Id.*

[106] *Id.* This provision of the MLLCA in effect prevents unscrupulous members of an LLC from attempting to defraud lending institutions. Absent such a provision, a member could promise to contribute a certain amount of capital, allowing the LLC to solicit loans based on an inflated capital account. By then compromising this promise, the member could be freed of his obligation while at the same time the lender could be left without a sufficient avenue of recovery should the LLC become insolvent. This concept is supported by several acts including the Prototype ULLCA, *supra* note 5, the Delaware act, and the Virginia act. *See* Prototype ULLCA § 402; DEL. CODE ANN. tit. 6, § 21-18-502 (Supp. 1992); VA. CODE ANN. § 13.1-1027 (Michie 1993).

[107] MISS. CODE ANN. § 79-29-503 (Supp. 1994). The MLLCA default rule is that

tators have suggested, however, that the expectations of members in a small, informal LLC may be better met by mandating distributions on a per capita basis. These commentators argue that such a per capita requirement would also reduce the burden on unsophisticated companies who would otherwise be forced to keep up-to-the-minute records of capital contributions.[108] However, since the MLLCA scheme of distribution is a default rule and thus subject to change at the discretion of the LLC members, a per capita distribution method may be implemented by a simple statement to that effect in the certificate of formation or LLC agreement.

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unless otherwise stated, profits and losses will be divided according to the value of the contributions made by each member "to the extent they have been received by the limited liability company and have not been returned." *Id.* § 79-29-503. A literal reading of the language seems to indicate that although promised contributions do count towards determining a member's capital contributions, promised contributions may not be used in determining distributions of profits and losses. *Id.* Although § 7 of the Act requires a statement of "the amount of cash and a description and statement of the agreed value of the other property or services contributed" to be kept with the LLC's mandatory records, it does not specify how often these records should be updated. MISS. CODE ANN. § 79-29-107 (Supp. 1994). A pro rata scheme, therefore, could require quick determinations of capital contributions before any distribution.

[108] *See* ABA Prototype Act, *supra* note 1, commentary at 36 (anticipating distribution on per capita basis); Prototype ULLCA, *supra* note 5, commentary at 48 (same).

2. Distributions

Unless altered in the certificate of formation or LLC agreement, distributions under the MLLCA are limited to cash rather than an "in-kind" distribution of LLC assets.[109] The timing of distributions is not addressed in the MLLCA and therefore is based entirely on agreements between LLC members.[110] When a member fails to receive a distribution to which he is entitled, he gains the status of a creditor of the LLC.[111] This practically universal rule among LLC acts essentially converts a member's equitable interest into debt, thus allowing members to exercise any remedies in pursuit of the entitled distributions which would have been available to a creditor.

While all LLC acts contain some degree of limitation on

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[109] MISS. CODE ANN. § 79-29-603 (Supp. 1994). Conversely, if in-kind distributions are allowed in either the certificate of formation or limited liability company agreement, the MLLCA default rule states that a member cannot be forced to accept an in-kind distribution of any asset "to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited liability company." *Id.* § 79-29-603. This provision seeks to prevent a majority of LLC members or managers from giving an unpopular member or manager only in-kind distributions and not cash distributions,thus acting to protect the financial interests of the LLC members and managers. *Id.*

[110] MISS. CODE ANN. § 79-29-603 (Supp. 1994). The MLLCA's failure to address timing of distributions apparently reflects a belief that since the members and managers of LLCs will in most cases be involved in the day-to-day activities of the company at least to some extent, these persons will best be able to determine when the LLC may be financially able to make distributions. This provision thus allows LLCs to make interim distributions at such times as it deems it economically feasible to do so. ABA Prototype Act, *supra* note 1, § 601 commentary.

[111] MISS. CODE ANN. § 79-29-604 (Supp. 1994). Although § 79-29-604 gives the LLC members the status of creditors for distributions to which they are entitled, it does not place them in a position superior to any other creditor of the LLC. Section 79-29-805 of the Act provides an absolute rule of distribution of assets upon the winding up of an LLC. MISS. CODE ANN. § 79-29-805 (Supp. 1994). This rule states that assets will be distributed first to creditors of the LLC, second to members in satisfaction of outstanding distributions owed them, and finally to members proportionally for their contributions. *Id.* § 79-29-803. Therefore, § 79-29-604 does not place members who are owed distributions on the same level as actual creditors of the LLC, although such members do possess all remedies to which a creditor is entitled to pursue payment. MISS. CODE ANN. § 79-29-604 (Supp. 1994).

distributions, these rules vary from act to act in both substance and underlying rationale. The MLLCA imposes two basic tests on LLCs seeking to make distributions: an insolvency test and a balance sheet test.[112] The insolvency test prohibits distributions which would render the LLC unable to pay its debts as they came due.[113] The balance sheet test, on the other hand, does not allow distributions where total liabilities would exceed total assets after distribution.[114] Unless an LLC meets *both* tests, no distribution is permitted.[115] Commentators have suggested that these dual requirements are appropriate since they provide a safe harbor for members and managers by respecting the rights of both superior equity owners and creditors.[116] The twin tests also assure LLC creditors of the financial stability of the entity by acting to prevent wrongful distributions, thus improving the attractiveness of an LLC as an investment vehicle.[117]

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[112] MISS. CODE ANN. § 79-29-605(1)(a)-(b) (Supp. 1994). The Mississippi corporate statute likewise protects its shareholders interests by use of these twin tests. Miss. Code Ann. § 79-4-6.40 (1989). *But cf.* MISS. CODE ANN. § 79-14-607 (1989) (holding limited partners responsible only for balance sheet test).

[113] MISS. CODE ANN. § 79-29-605(1)(a) (Supp. 1994).

[114] *Id.* § 79-29-605(b).

[115] MISS. CODE ANN. § 79-29-804(1) (Supp. 1994). The MLLCA allows members or managers to determine that a distribution will not violate either test by the use of two methods. *Id.* First, the LLC may base its decision on financial statements prepared on the basis of accounting practices and principles that are reasonable under the circumstances. *Id.* Given this second alternative, it is clear that an accountant need not be employed in this determination in every case. Members of a small, informal LLC may be able to make a determination that a distribution will not violate either test on their own initiative as long as the decision is based on a reasonable method. *Id.*

[116] *See* ABA Prototype Act, *supra* note 1, § 603; Prototype ULLCA, *supra* note 5, § 408. The ABA Prototype Act contains no express provisions which limit distributions, but does state that the insolvency and the balance sheet tests adequately protect the rights of both superior equity owners and creditors. ABA Prototype Act, *supra* note, 1, § 603. The ULLCA Prototype drafters promulgated both tests, feeling they provided an adequate test for distributions since they assure creditors of the company's stability. Prototype ULLCA, *supra* note 5, § 408. The MLLCA through its adoption of both tests addresses the concerns of each model act. Some states, however, do not consider these twin tests necessary. Delaware, for example, follows its liberal corporate law and only limits distributions under the balance sheet test, apparently feeling that it provides sufficient protection. DEL. CODE ANN. tit. 6, § 18-607 (Michie 1993).

[117] MISS. CODE ANN. § 79-29-605 (Supp. 1994). Under the MLLCA, both man-

F. Transferability of Membership Rights

LLC membership interests under the MLLCA are considered personal property[118] and are separable into two distinct parts: financial rights and governance rights.[119] Financial rights, or the right to share in LLC profits, are freely assignable by the member[120] However, a disposition of financial rights in and of itself does not bring with it corresponding governance rights.[121] Before such an assignee may participate in decision-making concerning the LLC, the Act requires by default unanimous consent of all members.[122] When such

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agers and members who approve wrongful distributions are held personally liable for the distribution; there is no need to show they profited from the distribution in any way. *Id.* § 79-29-606. Obviously, this personal liability along with the existing duty of care set out under § 79-29-402(1)(a)-(c) will help ensure that decision-makers will exercise extreme caution in authorizing questionable distributions, thus protecting LLC assets. It should be noted, however, that the MLLCA reduces the normal tort statute of limitations from three years to two years in the case of a wrongful distribution. MISS. CODE ANN. § 79-29-606 (Supp. 1994).

[118] *Id.* § 79-29-701.

[119] Kalinka, *supra* note 5, at 1137-39; *cf.* MISS. CODE ANN. § 79-14-702 (1989). The division allows assignation of financial rights without a simultaneous transfer of the right of control. Kalinka, *supra* note 5, at 1137-39.

[120] MISS. CODE ANN. § 79-29-702 (Supp. 1994). These financial rights entitle the assignee, to the extent assigned, to share in profits, losses, distributions, allocations of income, gain, loss, deductions, credits, or other items to which the assignor would have been entitled. *Id. Cf.* MISS. CODE ANN. § 79-14-702 (1989) (containing identical financial rights provision in limited partnership area).

[121] MISS. CODE ANN. § 79-29-702 (Supp. 1994). The MLLCA makes it clear that a mere assigning of the right to participate in LLC finances does not entitle the assignee to participate in control of the LLC. Indeed, the Act goes even further and states that "[u]nless otherwise provided, . . . the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the limited liability company interest of the member shall not cause the member to cease to be a member or to cease to have the power to exercise any rights or powers of a member. *Id.*; *cf.* Miss. Code Ann. § 79-14-702 (1989) (stating assignment of financial rights does not include full partnership rights). Thus, even judgment creditors of the assigning member who receive a financial interest in the LLC equivalent to the amount of outstanding judgement owed them receive only the status of a normal assignee. MISS. CODE ANN. § 79-29-703 (Supp. 1994).

[122] MISS. CODE ANN. § 79-29-704(1) (Supp. 1994). The MLLCA allows flexibility in this area since any other method of member admission following an assignment may be used pursuant to the certificate of formation of LLC agreement. *Id.* § 79-29-704(1). The unanimous vote requirement is an attempt to defeat the corporate characteristic of free transferability which could subject the LLC to corpo-

consent has been granted, however, the assignee becomes a member with all rights, obligations, and restrictions set out in the certificate of formation.[123] One such obligation the MLLCA imposes on an assignee turned member is that although his assignor remains liable for any obligations on his part to make or return contributions, the new member also is held liable to insure payment of such debt.[124] Although such a requirement may seem harsh, it provides creditors with two possible avenues of recovery should the LLC become insolvent, thus making the LLC more attractive to lenders.

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rate taxation under the current regulations. *See infra* notes 143-93 and accompanying text for a discussion of corporate characteristics.

Only in one instance under the MLLCA does an outside person become vested with the full powers of a member solely through operation of law. If a member dies or is adjudged incompetent, "the member's executor, administrator, guardian, conservator, or other legal representative" becomes fully empowered to utilize all of the powers and rights of the member in the administering his property or settling his estate. MISS. CODE ANN. § 79-29-705 (Supp. 1994). Once this settlement or administration is complete, however, the legal representative is divested of membership rights. *Id.* § 79-29-705.

[123] MISS. CODE ANN. § 79-29-704(2) (Supp. 1994).

[124] MISS. CODE ANN. § 79-29-704(2) (Supp. 1994). An assignee is provided a degree of protection since he is not responsible for liabilities which were unknown to the assignee at the time he became a member and which could not have been ascertained from the records of the LLC. *Id.* § 79-29-704(2). However, members, including new assignees, need not assent or otherwise become a party to any type of restrictive agreement before such agreement will become effective as to that member. *Cf.* Miss. Code Ann. § 79-4-6.27 (1989) (requiring assent to such agreements in corporate context).

G. Dissolution and Dissociation

Unlike many acts, the MLLCA does not require LLCs to specify a date of dissolution; rather, dissolution occurs by default upon any one of three dates.[125] Organizers of an LLC may elect to dissolve and wind its affairs up upon any time or event specified in the certificate of formation.[126] Additionally, LLCs may dissolve upon unanimous written consent of the members[127] or upon dissociation of a member.[128] Under the Act, LLCs may also be judicially dissolved upon petition of a member whenever it is not reasonably practicable to carry on business, or whenever members or managers are guilty of

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[125] MISS. CODE ANN. § 79-29-801(a)-(d). Upon the occurrence of any one of these dissociation events, the LLC may begin winding up its operations either through the actions of appropriate members or managers or by the order of the chancery court of the county in which the LLC's registered office is located, provided just cause is shown. *Id.* § 79-29-803(1). This winding up may include defending or prosecuting suits on the LLC's behalf, settling and closing the company's business, disposing of and conveying LLC property, discharging company liabilities, and distributing remaining assets to the members. *Id.* § 79-29-803(2).

[126] MISS. CODE ANN. § 79-29-801(a)-(b) (Supp. 1994). Specific dissolution events may also be listed in the LLC agreement. *Id.* § 79-29-801(b). Such a provision allows organizers to create an LLC for a limited duration or for the accomplishment of a specific goal. ABA Prototype Act, *supra* note 1, § 901 commentary.

[127] MISS. CODE ANN. § 79-29-801(c). Although unanimous consent is required by default in order to dissolve an LLC, the certificate of formation or LLC agreement may provide that a lesser percentage of members may dissolve the company. *Id.*

[128] MISS. CODE ANN. § 79-29-801(a)-(d). Upon dissociation, remaining members retain the option of continuing LLC operations. *Id.* § 79-29-801(d). To do so, the remaining members must unanimously vote to continue business within 90 days following dissolution. *Id.*

Upon dissolution, the LLC must file with the Secretary of State's office a certificate of dissolution which states the name of the LLC, the reason for the filing of the certificate, the future effective date of cancellation, and any other information which is deemed necessary. This document is important since even after dissolution, members may still bind the LLC in transactions provided "the other party to the transaction does not have notice of dissolution." MISS. CODE ANN. § 79-29-804(1)(b) (Supp. 1994). Since the certificate of dissolution is presumed to provide notice of dissolution, it limits the LLC's potential post-dissolution liability under this provision. *Id.* § 79-29-804(2). Once the LLC's affairs are wound up, an additional certificate of cancellation must be filed to officially end the LLC's existence. *Id.* § 79-29-204. This document contains substantially the same information requirements as the certificate of dissolution. *Id.*

continuing fraud or unfairness toward other members or of misapplication of LLC assets or funds.[129]

When an LLC is to be dissolved, certainly one of the most pressing concerns facing managers and members is the satisfaction of outstanding obligations of the company. In order to dispose of known claims against the LLC, the company must only provide such claimants with written notice at some point before dissolution is finalized.[130] For the company to dispose of unknown claims against it, the LLC must publish notice of its imminent dissolution and request that any person or entity with a claim against the LLC come forward.[131] Claimants who fail to come forward within the time limits specified under the Act are barred from presenting their claims against the LLC and are effectively left without a remedy.[132]

As in the limited partnership setting, dissociation of members forms a major area of concern for LLCs. Under the MLLCA, a member may be automatically dissociated upon

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[129] MISS. CODE ANN. § 79-29-802(a), (b) (Supp. 1994). Section 49(b) expands the courts power to judicially dissolve an LLC beyond that recognized by the model acts, essentially creating a private right of action for minority members against managers or majority members. *Compare* § 79-29-802(b) *with* ABA Prototype Act, *supra* note 1, § 902 (providing judicial dissolution only for business impracticability). Although the MLLCA's default rules provide that a member may withdraw at anytime, restrictions can be imposed on members ability to "cash out" their LLC interest in the certificate of formation of LLC agreement. *Id.* § 79-29-307(3). If such restrictions are in place, judicial dissolution may provide a remedy to members who are unable to withdraw, thus providing a means for dissociating from the LLC without acting in contravention of the LLC agreement of certificate of formation.

[130] MISS. CODE ANN. § 79-29-806(2) (Supp. 1994). This notice must contain (1) information that must be included in a claim; (2) a mailing address where the claim may be sent; (3) the deadline by which the LLC must have received the claim; and (4) a statement to the effect that claims received after the deadline will be barred. *Id.* § 79-29-806(2)(a)-(d).

[131] MISS. CODE ANN. § 79-29-807(1) (Supp. 1994). Notice published under this section must be published once in a newspaper of general circulation" in the county where the LLC's principal office or registered office is located. *Id.* § 79-29-807(2)(a). The notice must include a mailing address to which claims should be addressed and should state that unless presented within five years of the later of the published notice or filing of certificate of dissolution, claims against the LLC will be barred. *Id.* § 79-29-807(2)(b)-(c).

[132] MISS. CODE ANN. §§ 79-29-806 to -807 (Supp. 1994).

that member's voluntary withdrawal,[133] assignment of an LLC interest,[134] removal,[135] bankruptcy,[136] death or incompetency,[137] or dissolution or termination if that member is a business entity.[138] However, if the certificate of formation allows a member to voluntarily withdraw, thirty days written notice must be given to the remaining members.[139] This notice is important since it allows the LLC to take steps to continue business and permits members to evaluate and pay the fair value of the dissociating member's interest.[140] Members who seek to wrongfully dissociate themselves either by failing to meet statutory requirements or by acting in contravention of either the certificate of formation or LLC agreement may be held liable to the LLC for any damages resulting

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[133] MISS. CODE ANN. § 79-29-307(1)(c) (Supp. 1994).

[134] MISS. CODE ANN. § 79-29-307(1)(b). "Assignment of an LLC interest" as used under § 28(1)(b) refers to the complete LLC interest rather that merely the financial rights to receive distributions. *Id.* § 79-29-702.

[135] MISS. CODE ANN. § 79-29-307(1)(c) (Supp. 1994). Although the MLLCA does not provide for expulsion of a member, it is clear such action was contemplated by the Act's drafters as members may contractually agree to this action in the certificate of formation or LLC agreement. *Id.* § 79-29-307(1)(c). Courts will undoubtedly enforce these agreements much as in the partnership setting. ABA Prototype Act, *supra* note 1, § 802 commentary.

[136] MISS. CODE ANN. § 79-29-307(1)(d) (Supp. 1994). The MLLCA, unlike some acts, specifically lays out the points during a bankruptcy proceeding which prompt a member's dissociation. *Id.* Members are free to alter these points as they see fit whether by vote or through the certificate of formation. *Id.* Debate exists as to whether bankruptcy should be grounds for dissociation at all since the mere assignment of a member's entire interest to a trustee will not impose liability on the LLC as it would if a partner in a general partnership took bankruptcy. ABA Prototype Act, *supra* note 1, § 802 commentary. However, since this language concerning bankruptcy has in the past helped ensure discontinuity of life, it remains standard language in most acts. *Id.*

[137] MISS. CODE ANN. § 79-29-307(1)(f)(i)-(ii) (Supp. 1994).

[138] MISS. CODE ANN. § 79-29-307(1)(g)-(j) (Supp. 1994). These provisions merely provide that if the member is a trust, corporation, estate, partnership, limited partnership, or other limited liability company, that entity's dissolution or termination automatically results in dissociation. *Id.* § 79-29-307(1)(f)(i)-(ii).

[139] MISS. CODE ANN. § 79-29-307(3) (Supp. 1994). The MLLCA contemplates that a member may be able to withdraw at anytime. *Id.*

[140] MISS. CODE ANN. § 79-29-602 (Supp. 1994). Upon dissociation, members are entitled to receive the fair value of their interest in the LLC as of the date of dissolution. *Id.*

from the actions.[141] These damages may be withheld from any distributions to which the dissociating member is entitled, or may be sought from any other applicable remedy.[142]

IV. MISSISSIPPI LLC PARTNERSHIP TAXATION

As a flexible act, the MLLCA contains default provisions concerning certain tax sensitive issues in forming and operating an LLC which if contractually altered by the members may jeopardize an LLC's pass-through taxation[143] at both the federal and state level.[144] These provisions in the Mississippi Act are designed to conform to the four-factor resemblance test established by the Service in the Treasury Regulations, which affords pass-through taxation to a non-corporate entity only if the non-corporate entity lacks at least two of the traditional corporate characteristics of limited liability, continuity of life, centralized management and free transferability of ownership interest.[145] So long as members do not contractually alter the scheme set out by the MLLCA, a Mississippi LLC is assured pass-through taxation under the current regulations. The MLLCA, like all other LLC acts, limits its members' liability to the amount of their investment in the company;[146] therefore, by definition, a Mississippi LLC will

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[141] MISS. CODE ANN. § 79-29-307(3) (Supp. 1994). If the LLC is of a limited duration or created for a particular undertaking, dissociation of a member before expiration of the term also constitutes wrongful dissociation. *Id.*

[142] *Id.* Such remedies may include those set forth in the certificate of formation, LLC agreement, or at common law. *Id.*

[143] For discussion of "flexible" and "bullet-proof" statutes, see *supra* notes 25-32 and accompanying text.

[144] A Mississippi LLC's classification for state income tax purposes is contingent upon its classification for federal income tax purposes under the Treasury Regulations. MISS. CODE ANN. § 79-29-112 (Supp. 1994). If a Mississippi LLC is classified as a partnership for federal income tax purposes, then the state will likewise tax the company as a partnership. *Id.*

[145] Treas. Reg. § 301.7701-2(a)(1) (as amended in 1993); *see supra* notes 18-24 and accompanying text.

[146] MISS. CODE ANN. § 79-29-305(1) (Supp. 1994). A member of the LLC is not liable "by reason of being a member, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the [LLC], whether arising in contract, tort or otherwise or for the acts or omissions of any

possess the corporate characteristic of limited liability.[147] Consequently, the MLLCA's default rules are designed to lack the remaining three characteristics.

A. Continuity of Life

The first remaining corporate characteristic which may adversely affect an LLC's pass-through taxation is the continuous life of the business.[148] An LLC possesses continuity of life if "the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not cause a dissolution of the organization."[149] Dissolution, in this context, does not require the total cessation of operation; rather, it suffices that the "mutual agency" relationship existing in an organization terminates upon the happening of one of the above listed events.[150] A Mississippi LLC dissolves: (1) at the time or up-

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other member, manager, agent or employee of the [LLC]." *Id.* § 79-29-305.

[147] *See* Treas. Reg. § 301.7701-2(d) (as amended in 1993). Under the regulations, an entity possesses limited liability if "under *local law* there is no member who is personally liable for the debts of or claims against the organization." *Id.* § 301.7701-2(d)(1) (emphasis added).

[148] *Id.* § 301.7701-2(a)(1).

[149] *Id.* § 301.7701-2(b)(1). Continuity of life is a corporate characteristic because a corporation only ceases to exist upon formal liquidation and does not dissolve upon the "death, retirement, resignation, insanity, bankruptcy, or expulsion of one of the original owners." Hamill, *supra* note 5, at 726; *see* MISS. CODE ANN. §§ 79-4-2.03(a), -14.02, -14.20, -14.30 (1989); *see also* Keatinge et al., *supra* note 5, at 425. "Based upon at least one private letter ruling, it appears that, to avoid continuity of life, an (sic) LLC need not dissolve upon all types of dissociation events, and dissolution may be limited to the dissociation of a particular member." Lawrence H. Brenman, *Limited Liability Companies Offer New Opportunities to Business Owners*, 10 J.P. TAX'N 301, 305 (1994); *see* Priv. Ltr. Rul. 92-10-019, 1991 PRL LEXIS 2520 (Dec. 6, 1991).

[150] Treas. Reg. §301.7701-2(b)(2) (as amended in 1993) (establishing that destruction of "mutual agency" between partners in general partnership where one partner resigns destroys partnership's identity). The regulations define dissolution as "an alteration of the identity of an organization by reason of a change in the relationship between its members as determined under *local law*." *Id.* (emphasis added). The regulations provide that any organization formed under the UPA or the RULPA will lack continuity of life for federal tax purposes. *Id.* § 301.7701-2(b)(3).

For a discussion of the application of Treas. Reg. § 301.7701-2(b)(3) to the UPA and the RULPA, see Hamill, *supra* note 5, at 727; *see also* Orsi, *supra* note

on the occurrence of events set out in the certificate of formation, if any;[151] (2) at the unanimous written consent of all members, unless the certificate of formation or LLC agreement requires a less than unanimous consent;[152] or (3) upon the occurrence of certain dissociation events,[153] including the death,[154] incompetency,[155] bankruptcy,[156] voluntary withdrawal,[157] expulsion or dissolution[158] of any member, by default,[159] unless all remaining members unanimously consent to continue the business within ninety days after the occurrence of an event of dissolution.[160] Accordingly, a Mississippi LLC formed utilizing the default provisions of sections 79-29-801 and 79-29-307, without alteration in the certificate

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5, at 168 (noting that "because the dissolution provisions in [many of] the existing LLC acts are modeled after the UPA, most LLCs will automatically lack continuity of life."). The Mississippi provision on dissolution, however, is not modeled verbatim on the UPA.

[151] MISS. CODE ANN. § 79-29-801(a)-(b) (Supp. 1994).

[152] MISS. CODE ANN. § 79-29-801(c) (Supp. 1994). The ability to dissolve the LLC with less than unanimous consent of the members does not affect the LLC's lacking continuity of existence since under the regulations an organization lacks continuity of existence if *any member* can voluntarily cause the dissolution of the organization. Treas. Reg. § 301.7701-2 (as amended in 1993) (emphasis added).

[153] For a complete discussion of dissociation events under the MLLCA, *see supra* notes 133-42 and accompanying text.

[154] MISS. CODE ANN. § 79-29-307(1)(f)(i) (Supp. 1994).

[155] MISS. CODE ANN. § 79-29-307(1)(f)(ii) (Supp. 1994).

[156] MISS. CODE ANN. § 79-29-307(1)(d)(ii)-(iv) (Supp. 1994).

[157] MISS. CODE ANN. § 79-29-307(1)(a)-(b), -307(3) (Supp. 1994). The regulations provide that "if the [statute] expressly provides that the organization can be terminated by the will of any member, it is clear that the organization lacks continuity of life." Treas. Reg. § 301.7701-2(b)(3) (as amended in 1993). If, under the statute, certificate of formation or LLC agreement, no member has the power to dissolve the LLC, then continuity of life exists. *Id.*

[158] MISS. CODE ANN. § 79-29-307(1)(h)-(j) (Supp. 1994). In the case of a member that is a trust, or by virtue of being a trustee thereof, the termination of the trust causes dissociation of the member. *Id.* § 79-29-307(1)(g).

[159] The LLC may elect in its certificate of formation or LLC agreement that the death, incompetency or bankruptcy of a member do not constitute a dissociation event, or, if no such election is made, members, upon the occurrences of one or all of the above listed events, may unanimously consent not to consider the event as a dissociation of the member. *See* MISS. CODE ANN. § 79-29-307 (Supp. 1994).

[160] MISS. CODE ANN. § 79-29-801(d) (Supp. 1994). Judicial dissolution under § 79-29-803 does not render discontinuity of life.

of formation or LLC agreement, will not possess the corporate characteristics of continuity of life under the regulations, and, therefore, will obtain partnership classification for federal tax purposes provided that at least one other corporate characteristic is lacking.[161]

The MLLCA, however, provides that the certificate of formation or LLC agreement may provide for less than unanimous approval for the continuation of the LLC upon the occurrence of a dissolution event.[162] It is well established that requiring unanimous consent of the remaining members to continue the LLC after the occurrence of a dissociation event will result in the LLC lacking continuity of life.[163] A question that has lingered for some time, however, is whether less than unanimous consent to continue the business after the occurrence of a dissolution event will render continuity of life.

At the time of the drafting of the dissolution provision in the MLLCA, the regulations provided that for discontinuity of life to exist, the withdrawal of a general partner in a limited partnership must dissolve the partnership, "unless *all* remaining members agree to continue the partnership."[164] Thus, at that time, the regulations appeared to impose continuity of life where an LLC's certificate of formation or LLC agreement provided that less than unanimous consent was sufficient to con-

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[161] *See* Rev. Rul. 88-76, 1988-2 C.B. 360. Under Rev. Rul. 88-76, the Service ruled that an LLC formed under Wyoming law will inherently lack continuity of life. *Id.* A Wyoming LLC dissolves (1) at the expiration or the period of duration set out in the articles of organization (not to exceed 30 years), (2) at the "unanimous written agreement of all members," or (3) at the "death, retirement, resignation, expulsion, [or] bankruptcy" of a member, unless all remaining members *unanimously* consent to the continuation of the business of the LLC. WYO. STAT. § 17-15-123 (1977); *see* Rev. Rul. 93-6, 1993-1 C.B. 229 (ruling that LLCs formed under Colorado's LLC act, with substantially similar language to Wyoming's act, lacks continuity of life).

[162] MISS. CODE ANN. § 79-29-801(d) (Supp. 1994).

[163] *See* Rev. Rul. 93-6, 1993-1 C.B. 229; Rev. Rul. 93-5, 1993-1 C.B. 227; *see also* Priv. Ltr. Rul. 93-35-062, 1993 PRL LEXIS 1386 (June 11, 1993); Priv. Ltr. Rul. 93-18-011, 1993 PRL LEXIS 204 (Feb. 3, 1993); Priv. Ltr. Rul. 91-19-029, 1991 PRL LEXIS 263 (Feb. 7, 1991); Priv. Ltr. Rul. 90-52-039, 1990 PRL LEXIS 2722 (Oct. 2, 1990).

[164] Treas. Reg. § 301.7701-2(b)(1) (as amended in 1983).

tinue the business.[165] As of June 14, 1993, however, the regulations have been amended to provide that a majority in interest[166] consent suffices to continue the partnership upon the occurrence of a dissolution event without constituting continuity of life.[167] At the time this regulation was adopted, some confusion existed as to whether the majority in interest requirement was restricted to only the limited partnership setting, or whether it encompassed LLCs as well.[168] In Revenue Ruling 94-30,[169] the Service clarified this issue and ruled

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[165] In 1989, the Service stated that it would not consider a limited partnership to lack continuity of life if *less than a majority* of limited partners could elect a new general partner to continue the business after the removal of an existing general partner. *See* Rev. Proc. 89-12, 1989-1 C.B. 798. Thus, apparently, a number presenting *at least* a majority was sufficient in the limited partnership context. However, the service did not extend this to the LLC context, indicating in a subsequent private letter ruling that an LLC's continuity of life is not avoided by majority consent. *See* Priv. Ltr. Rul. 90-10-027, 1989 PRL LEXIS 3810 (Dec. 7, 1989); *see also* Orsi, *supra* note 5, at 169.

[166] In calculating "majority in interest," practitioners must use "book profits and appreciation." *See* Rev. Proc. 94-46, 1994-28 I.R.B. 129. Practitioners must not confuse any state law definition of "majority in interest" with that required under federal tax laws. 94 TAX NOTES TODAY 220 (Nov. 9, 1994).

[167] Treas. Reg. § 301.7701-2(b)(1) (as amended in 1993). In explaining the amendment, the Service stated that "contingent continuity of existence" as opposed to the "chartered life of a corporation . . . causes a limited partnership to lack continuity of life," and the majority in interest requirement "is a meaningful contingency." 58 Fed. Reg. 28,501 (1993).

[168] In adopting the revised regulation, the Service refused to incorporate into the regulation a provision ensuring its applicability to LLCs and other unincorporated organizations, as suggested by commentators. *See* 58 Fed. Reg. at 28,502. In refusing the provision, the service stated that the commentators' "concerns have been addressed to a significant degree in other published guidance or will be considered for future public guidance." *Id.* As examples supporting this contention, the Service cited Revenue Rulings 88-76, 93-5 and 93-6, each of which provide that continuity of life does not exist because the respective statutes require *unanimous* consent of the LLC's members to continue the business upon the occurrence of a dissolution event. *Id.*

This issue was further confused with the issuance of private letter ruling 93-08-027, which ruled that consent by a "*majority of the managing directors and a majority in interest and in numbers* of the remaining members" of the LLC to continue the business after the occurrence of a dissolution event was sufficient to lack continuity of life. Priv. Ltr. Rul. 93-08-027, 1992 PRL LEXIS 2516 (Nov. 27, 1992) (emphasis added).

[169] 1994-19 I.R.B. 6, 1994 IRB LEXIS 244.

that, upon the occurrence of an event of dissolution, the remaining members of an LLC representing majority in interest may elect to continue the business without possessing the corporate characteristic of continuity of life.[170] Thus, so long as the Service continues to recognize this ruling, organizers or members of Mississippi LLCs may modify the section 79-29-801(d) default provision requiring unanimous consent to continue the business after a dissolution event and provide for a majority in interest election to continue the business without jeopardizing its partnership tax status under the current regulations.

B. Centralization of Management

The second corporate characteristic which will adversely affect an LLC's pass-through tax treatment is the presence of a centralized form of management. Centralization of management exists in an LLC "if any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed."[171] If management decisions must be ratified by the

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[170] The Service noted that although the regulation's allowance of a majority in interest agreeing to continue a limited partnership specifically addresses the dissolution of a limited partnership, "the contingent continuity of life concept reflected in the regulation . . . applies in classifying LLCs." *Id.*; *see also* Rev. Rul. 94-51, 1994-32 I.R.B. 11, 1994 IRB LEXIS 383 (recognizing extension of Treas. Reg. § 301.7701-2(b)(1) to encompass LLCs); Rev. Rul. 94-6, 1994-3 I.R.B. 11, 1994 IRB LEXIS 46 (same); Rev. Rul. 94-5, 1994-2 I.R.B. 21, 1994 IRB LEXIS 3 (same). Continuation of the business after an event of dissolution "is not assured [where] a majority in interest of the remaining members must agree to continue the business." Rev. Rul. 94-30, 1994-19 I.R.B. 6, 1994 IRB LEXIS 244.

[171] Treas. Reg. § 301.7701(c)(1) (as amended in 1993). According to one author, the key to centralized management in the regulations is "representative management: if a group of persons is vested with management authority which resembles the powers and functions of a board of directors of a corporation, centralized management will be found to exist." Kenneth L. Harris & Francis J. Wirtz, *Corporate Governance, Limited Liability Companies and the IRS's View of Centralized Management*, 71 TAXES 225, 229 (April, 1993). The regulations do not contemplate any particular "form, structure or method of centralized management." *Id.* at 229 n.20.

members of the LLC, then centralized management is lacking.[172] An LLC will not lack centralized management solely on the grounds that the manager is also a member of the LLC.[173]

Section 79-29-302 of the MLLCA provides the general default rule that management of an LLC is vested in its members.[174] Management responsibility, however, may be delegated to one or more managers through an election made either in the certificate of formation or LLC agreement.[175] It is well established that an LLC managed by its members will lack centralized management;[176] therefore, any Mississippi LLC organized without altering section 79-29-302 default provisions will lack centralized management for classification as a partnership for federal tax purposes. Of course, it may be more beneficial to an LLC with widely dispersed members, or an LLC with a large number of members to consolidate the control of the company into a small group of managers, thereby facilitating the practical business needs of the company.[177] If authority to manage the LLC is vested in one or

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[172] Treas. Reg. § 301.7701-2(c)(3) (as amended in 1993). Centralized management does not exist "when the centralized authority is merely to perform ministerial acts as an agent at the direction of a principal." *Id.* Centralization of management exists where the continuing exclusive authority to make management decisions is concentrated in a small group. *Id.* § 301.7701-2(c)(2).

[173] *Id.* § 301.7701-2(c)(2). For purposes of the regulations, a manager may or may not be a member of the LLC. *Id.*

[174] MISS. CODE ANN. § 79-29-302 (Supp. 1994). Unless otherwise provided in the certificate of formation or LLC agreement, each member possesses equal management rights, regardless of the member's percentage of interest in the LLC. *Id.* § 79-29-304(1).

[175] MISS. CODE ANN. § 79-29-401(1) (Supp. 1994). The power and authority of the LLC's managers may be limited by the certificate of formation or LLC agreement. *Id.* § 79-29-401(1).

[176] 1 FIFTIETH INSTITUTE ON FEDERAL TAXATION § 8.03[4], at 8-8; *see* Rev. Rul. 93-6, 1993-1 C.B. 229; Rev. Rul. 93-5, 1993-1 C.B. 227; *see also* Priv. Ltr. Rul. 90-10-027, 1989 PRL LEXIS 3810 (Dec. 7, 1989).

[177] A major disadvantage of member control of the LLC is the agency power each member possesses to bind the company. Under § 24, every member of a member managed LLC is an agent of the company "for the purpose of conducting its business and affairs," with the authority to execute any instrument or enter into any agreement for the apparent "carrying on in the usual way the business or affairs" of the LLC. MISS. CODE ANN. § 79-29-303(1) (Supp. 1994). Alternative-

more managers, however, the LLC generally exhibits centralized management under the regulations.[178]

Although it has been argued that centralized management does not exist for purposes of classification under the regulations where the managers own at least twenty percent of the LLC's interests,[179] recent revenue rulings tend to indicate that managers' substantial interest in the LLC will not render decentralized management where the managers' authority is derived from the statute creating the LLC rather than from the managers' equity interest in the company.[180] A cen-

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ly, if management is vested in one or more managers, no member is an agent of the LLC solely by reason of being a member thereof. *Id.* § 79-29-303(2)(a); rather, authority to bind the LLC is vested with the manager or managers. *Id.* § 79-29-303(2)(b). For discussion of the management and agency powers of members and managers, see *supra* notes 84-99 and accompanying text.

[178] Brenman, *supra* note 149, at 303; *see* Rev. Rul. 88-76, 1988-2 C.B. 360 (finding Wyoming LLC to possess centralized management where management of 25 member LLC was vested in three managers).

[179] The regulations provide that a limited partnership organized under the RULPA will lack centralized management, unless the limited partners own substantially all of the partnership interests. Treas. Reg. § 301.7701-2(c)(4) (as amended in 1993). Although the regulations do not establish what a "substantial" interest is, the Service has stated that centralized management will not be found where the general partner of a limited partnership owns at least twenty percent of the partnership interests. *See* Rev. Proc. 89-12, 1989-1 C.B. 798, § 4.06. In Revenue Procedure 89-12, the Service stated that it would consider a non-partnership organization's managers as "general partners" and its non-managers as "limited partners," *Id.* § 1.02; therefore, since an LLC is a non-partnership state law entity, one may argue that vesting control of the LLC in one or more managers does not render centralized management so long as the managers own at least 20 percent of the LLC interests. For further discussion on the "substantial ownership" argument, see generally Keatinge et al., *supra* note 5, at 428-29; Hamill, *supra* note 5, at 734.

[180] In Revenue Ruling 88-76, the Service held that a Wyoming LLC possessed centralized management where control was vested in three managers, without addressing the managers' percentage of ownership in the LLC. *See* Rev. Rul. 88-76, 1988-2 C.B. 360. Furthermore, in Revenue Ruling 93-6, the Service ruled that a Colorado LLC possessed centralized management where all members of the LLC were managers because, "as provided by the Act, authority to make management decisions rest[ed] solely with the five members in their capacity as managers rather than as members." Rev. Rul. 93-6 1993-1 C.B. 229. Therefore, it seems that the Service views a member-manager as controlling the LLC in a representative capacity with authority flowing from the statute, indicating centralized management, rather than in a capacity as an owner of the LLC with authority

tralized power to bind the LLC controls the issue of whether centralized management exists for federal tax purposes.[181]

C. Free Transferability of Interest

The final corporate characteristic which will adversely effect an LLC's pass-through taxation is free transferability of ownership interest. An LLC possesses free transferability of ownership interest "if members owning substantially all of the interests of the LLC have the power to transfer *all* aspects of ownership to a person who is not a member without obtaining consent from the other members."[182] A member's ability to freely transfer economic interest in the LLC, without the ability to unilaterally transfer management rights, does not constitute free transferability of interest for purposes of partnership tax classification.[183]

In keeping with the flexible nature of the Mississippi Act, a Mississippi LLC interest is considered the personal property

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flowing from the manager's equity interest. *See* Harris & Wirtz, *supra* note 171, at 230. "For centralization of continuing authority to make management decisions to be lacking, authority to manage must derive from membership in the [LLC]." Sheppard, *supra* note 31, at 169.

Compare the authority of a corporate director with that of a managing general partner in a general partnership. A director who owns stock in the corporation controls the corporation by virtue of his statutory authority as director, not through his equity interest as a shareholder. A limited partnership's general partner, however, derives his authority from his equity interest and not solely from his designation as "general partner." *Id.*

For further discussion on the feasibility of structuring an LLC's management to achieve decentralized management under the regulations through manipulation of the equity structure of the LLC, see generally *Id.* at 225, 229-31.

[181] 65 TAX NOTES, 159, 160 (Oct. 10, 1994); *see* Priv. Ltr. Rul. 93-25-048, 1993 PRL LEXIS 654 (March 30, 1993) (finding decentralized management where power to bind rests with members and any member possesses authority to bind).

[182] Keatinge et al., *supra* note 5, at 427 (citing Treas. Reg. § 301.7701-2(e) (as amended in 1993).

[183] Treas. Reg. 301.7701-2(e) (as amended in 1993). The power to transfer one's right to share in the profits of the LLC does not constitute free transferability of one's interest in the LLC. *Id.* Furthermore, if local law provides that, notwithstanding an agreement allowing the transfer of interests, any transfer of a member's interest dissolves the LLC, then free transferability of interest does not exits. *Id.*

of the member;[184] therefore, the interest is freely assignable to the extent of the assignor's financial interests in the LLC.[185] An assignment of an LLC financial interest, however, does not dissolve the LLC,[186] nor does it entitle the assignee to become a member of the LLC or to exercise any rights thereof.[187] An assignee may only become a member of the LLC if the certificate of formation or LLC agreement provides for the assignment of membership rights,[188] or upon the unanimous consent of the LLC's remaining members.[189] Consequently, whether a Mississippi LLC will lack free transferability of interest depends upon what elections are made in the certificate of formation.

Because the MLLCA by default requires unanimous approval of the remaining members of the LLC upon an assignment of an interest in the LLC for the assignee to become a member, an LLC formed under the default statutory provisions will lack free transferability of interest.[190] The regulations, however, do not expressly state that unanimous consent

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[184] MISS. CODE ANN. § 79-29-701 (Supp. 1994).

[185] MISS. CODE ANN. § 79-29-702 (Supp. 1994). LLC interests are assignable to the extent that the assignment is not prohibited or otherwise restricted by the certificate of formation or LLC agreement. *Id.*

[186] Assignment of an LLC interest only transfers economic rights to the assignee, and, consequently, does not represent a change in the membership of the LLC; therefore, an assignment does not cause dissolution. *See* ABA Prototype Act, *supra* note 1, § 704.

[187] MISS. CODE ANN. § 79-29-702 (Supp. 1994).

[188] MISS. CODE ANN. § 79-29-702(1)(a) (Supp. 1994). The certificate of formation or LLC agreement may provide either that management rights are transferable without restriction, or are transferable subject to a less than unanimous approval of the remaining members of the LLC. *Id.*

[189] MISS. CODE ANN. § 79-29-702(1)(b) (Supp. 1994). The certificate of formation or the LLC agreement may provide that an assignee acquires a membership interest in the LLC upon less than unanimous consent of the remaining members of the LLC. *See id.* § 79-29-702(1)(a). The assignor of an interest in the LLC ceases to be a member upon assignment of the assignor's entire interest. *Id.* § 79-29-702.

[190] *See* Treas. Reg. § 301.7701-2(e)(1) (as amended in 1993) (providing that free transferability of interest exists only where members may transfer LLC interests *without approval* of other members). Unless the LLC elects out of the default provisions, the MLLCA requires unanimous consent. MISS. CODE ANN. § 79-29-704(1) (Supp. 1994).

of all remaining members is required to prevent free transferability of interest.[191] The Service has ruled that free transferability of interest does not exist where the certificate of formation or LLC agreement provides for the assignment of management rights in the LLC upon the consent of a majority in interest of the remaining members.[192] Therefore, it may be possible for a Mississippi LLC to provide in its certificate of formation or LLC agreement pursuant to section 79-29-704(1) ratification of an assignment of management rights by less than unanimous consent.[193]

V. THE MISSISSIPPI PROFESSIONAL LIMITED LIABILITY COMPANY

In a similar manner to Mississippi corporate law, which authorizes the formation and operation of both Mississippi Business Corporations[194] and Mississippi Professional Corporations,[195] the MLLCA authorizes individuals required by law to be licensed to perform "professional services" to form and operate as a Professional Limited Liability Company under Article Nine of the MLLCA.[196] Thus, under the Act,

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[191] *See* Treas. Reg. § 301.7701-2(e)(1) (as amended in 1993) (stating that consent of "*other members*" is required to prevent free transferability of interest rather than *all other members*); Keatinge et al., *supra* note 5, at 427-28 n.384.

[192] *See* Priv. Ltr. Rul. 93-50-013, 1993 PRL LEXIS 2083 (Sept. 15, 1993); Priv. Ltr. Rul. 92-19-022, 1992 PRL LEXIS 251 (Feb. 6, 1992). In Priv. Ltr. Rul. 91-07-028, 1990 PRL LEXIS *7 (Nov. 20, 1990), the Service ruled that free transferability of interest was lacking in a business trust where assignment of management rights required only the unanimous consent of the managers, not the members.

[193] Note, however, that the Service has issued no revenue rulings on the issue of majority in interest consent to assignment of management rights - only private letter rulings. Therefore, no precedent exists as to the effectiveness of the majority consent. A Mississippi LLC that wishes to provide for majority consent would be advised to first seek a private letter ruling concerning its federal tax classification.

[194] MISS. CODE ANN. §§ 79-4-1.01 to -17.04 (1989).

[195] MISS. CODE ANN. §§ 79-9-1 to -27 (1989).

[196] MISS. CODE ANN. § 79-29-901 (Supp. 1994). "Professional service" is defined as "any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization," including, for example, "personal services rendered by certified public accountants, dentists, architects, veterinarians, osteopaths, physicians, sur-

attorneys, certified public accountants and other professionals required by law to be licensed to perform professional services who elect to form an LLC are subject to the provisions of Article Nine. The statutory scheme integrated into the MLLCA subjects professional LLCs to the same provisions governing non-professional LLCs, but only to the extent that those provisions do not conflict with the specific provisions governing professional LLCs under Article Nine.[197]

Only individuals[198] who are "duly and properly licensed to render the same or related types[199] of professional services" may form, own, operate[200] or be a member of the professional LLC,[201] and the professional LLC may not engage "in

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geons and attorneys at law." MISS. CODE ANN. § 79-29-103(m) (Supp. 1994). Any business which could not have been operated as a corporation prior to the enactment of the Mississippi Professional Corporation Act (MsPCA) may, under Article Nine, operate as a professional LLC (PLLC). *Id.*

[197] MISS. CODE ANN. § 79-29-910 (Supp. 1994). Furthermore, PLLCs formed and operated under this Article remain subject to laws regulating their respective professions, except to the extent that such professional regulations conflict with Article Nine. MISS. CODE ANN. § 79-29-912 (Supp. 1994).

[198] Although §§ 79-29-901, -902 (Supp. 1994) allows "[o]ne or more" individuals to form and operate a PLLC, a single member PLLC will face the same potential adverse tax consequences as does a single member LLC. *See supra* notes 67-73 and accompanying text. Thus, pass-through taxation under the current Treasury Regulations may only be afforded a Mississippi PLLC with more than one member.

[199] Although Article Nine does not define "related types" of professional services, architectural and engineering services are specifically designed as related types of services. MISS. CODE ANN. § 79-29-902 (Supp. 1994).

[200] *Id.* These professional services may be rendered by the PLLC's members or managers, or the PLLC may employ licensed individuals to render such professional services on behalf of the PLLC. *Id.*; *see* MISS. CODE ANN. § 79-29-903 (Supp. 1994) (defining "employee" for purposes of this Article to preclude those "not ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required," such as "clerks, secretaries, bookkeepers, technicians, and other assistants").

[201] MISS. CODE ANN. § 79-29-906 (Supp. 1994). Any member, manager, agent or employee of the PLLC who "becomes legally disqualified [from] render[ing] such services" shall be removed from the PLLC, and shall divest all financial interest in the PLLC. MISS. CODE ANN. § 79-29-907(1) (Supp. 1994). PLLCs retaining any member, manager, agent or employee after legal disqualification shall be judicially dissolved. *Id.*

As in the case with a deceased member, the PLLC shall purchase a disqualified member's interest in the company at a price determined in the certificate of

any business other than the rendering of the professional services for which it was specifically formed."[202] With such limitations, it is not surprising that members are restricted from transferring their interest in the company to any individual not licensed to render the professional services for which the company was formed.[203] Furthermore, the professional LLC's certificate of formation or LLC agreement may impose specific restraints on alienation of a member's interest, and may require that any such transfers be made solely to the professional LLC.[204]

The primary difference between a professional and a non-professional LLC rests with member liability. Under the MLLCA, members of non-professional LLCs enjoy liability limited to the extent of their investment in the company.[205] Article Nine, however, differentiates between a member's liability for his or her own conduct and for the conduct of other members. The negligent or wrongful acts of a member do not subject the remaining members to personal liability solely by reason of their being a member of the professional LLC;[206] rather, their liability is limited to the extent of their investment in the company.[207] However, a member in a pro-

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formation or LLC agreement, or for book value of the interest. MISS. CODE ANN. § 79-29-907(2) (Supp. 1994).

[202] MISS. CODE ANN. § 79-29-905 (Supp. 1994). Such a limitation of business activity does not preclude a PLLC from investing its funds in income producing properties, such as real estate, mortgages, stocks or bonds. *Id.*

[203] MISS. CODE ANN. § 79-29-908 (Supp. 1994). Of course, as in all Mississippi LLCs, transferees of a member's interest in the PLLC receive only the transferring member's economic interest to share in the profits and losses of the company unless the required number of remaining members consent to the transferee acquiring full membership rights in the company, including the right to participate in management. MISS. CODE ANN. §§ 79-29-702, -704 (Supp. 1994). For discussion of transferability of LLC ownership interests under the MLLCA, see *supra* notes 118-24 and accompanying text.

[204] MISS. CODE ANN. § 79-29-908 (Supp. 1994).

[205] MISS. CODE ANN. § 79-29-305(1) (Supp. 1994).

[206] *Id.*

[207] MISS. CODE ANN. § 79-29-904 (Supp. 1994). The PLLC is liable "to the full extent of its property for any negligent or wrongful acts or misconduct committed by any of its members, managers, agents or employees while they are engaged" in rendering professional services on behalf of the PLLC. *Id.*

fessional LLC is personally liable for his or her own negligent or wrongful acts while rendering professional services on behalf of the company, or for the negligent or wrongful acts of any person under his or her "direct supervision and control."[208]

In forming professional LLCs, practitioners must recognize certain tax sensitive issues - some in common with non-professional LLCs, and others unique to professional LLCs. For a professional LLC to receive partnership classification for federal tax purposes, it must satisfy the same corporate resemblance standard required of non-professional LLCs.[209] Thus, it must possess no more than two of the corporate characteristics of limited liability, continuity of life, centralized management and free transferability of ownership interests. Although Article Nine imposes personal liability on members of professional LLCs for their own tortious conduct in performing professional services on behalf of the company,[210] professional LLCs still possess limited liability for federal tax classification purposes.[211] Thus, organizers or professional LLCs must structure the company to possess no more than one of the remaining corporate characteristics.[212]

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[208] MISS. CODE ANN. § 79-29-904 (Supp. 1994).

[209] *See supra* notes 143-93 and accompanying text.

[210] MISS. CODE ANN. § 79-29-904 (Supp. 1994).

[211] Under the regulations, "[a]n organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable *for the debts of or claims against* the [LLC]." Treas. Reg. § 301.7701-2(d) (as amended in 1993) (emphasis added). Because Article Nine does not extend to members of professional LLCs personal liability for the contracts or debts of the company, the LLC meets the definition of "limited liability" as set out in the regulations. The specific personal liability imposed by § 79-29-904 of the Mississippi Code appears to be intended only to maintain the status quo of professional responsibility presently imposed on those licensed to perform professional services in this state. *See* MISS. CODE ANN. § 79-29-904 (Supp. 1994) (ensuring that existing laws which apply to professional relationships and liabilities between professionals and clients are in no way restricted through professional LLCs).

[212] Because Article Nine, in effect, "sits on top of" the MLLCA, the default provisions regarding the tax sensitive corporate characteristics in the MLLCA are applicable to professional LLCs governed specifically by Article Nine to the extent that those provisions do not conflict with Article Nine. Because Article Nine does not otherwise affect the MLLCA provisions regarding centralized management,

An important issue raised in the professional LLC setting which does not affect non-professional LLCs arises with respect to conversion from an existing business entity to the LLC form. A general partnership may form a professional or non-professional LLC merely by contributing "his or her interest in [the partnership] in exchange for the same ownership interest in [the] LLC,"[213] and complying with statutory formation requirements.[214] Conversion from a general partnership to an LLC does not terminate the partnership for purposes of section 708 of the Internal Revenue Code;[215] thus, such a conversion causes neither the partnership, the LLC nor any partners to recognize a gain or loss under section 721.[216] Such is not the case, however, for professionals presently operating as a Mississippi Professional Corporation who wish to form a professional LLC. A transfer of interests by shareholders of a professional corporation to a newly formed professional LLC would be treated as a realization event, producing recognized gains or losses to both the corporation and its shareholders. Thus, professional corporations wishing to take

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continuity of life or free transferability of ownership interests, the analysis for both professional and non-professional LLCs are identical in those respects. For analysis of the MLLCA's particular tax sensitive provisions, see *supra* notes 143-93 and accompanying text.

[213] *See, e.g.*, Priv. Ltr. Rul. 94-32-018, 1994 PRL LEXIS 875 (May 16, 1994). When such a transfer of partnership interest is used to create the LLC, all partners contributing their partnership interest become members of the LLC. *Id.*

[214] The statutory formation requirements for PLLCs are virtually identical to those of non-professional LLCs, with the sole exception being that PLLCs must include at the end of its name the notation "Professional Limited Liability Company," "P.L.L.C." or "PLLC." MISS. CODE ANN. § 79-29-909 (Supp. 1994). For discussion of the statutory formation requirements, see *supra* notes 55-77 and accompanying text.

[215] Priv. Ltr. Rul. 94-32-018, 1994 PRL LEXIS 875 (May 16, 1994).

[216] *See* Priv. Ltr. Rul. 94-32-018 (May 16, 1994); Priv. Ltr. Rul. 94-22-034, 1994 PRL LEXIS 335 (March 3, 1994). Section 721 provides that "[n]o gain or loss shall be recognized to a partnership or to any of its partners in the case of a contribution of property to the partnership in exchange for an interest in the partnership." 26 U.S.C.A. § 721 (West 1986). Such a transfer will be treated as a gain or loss, however, to the extent provided under § 752 of the Internal Revenue Code. Priv. Ltr. Rul. 94-32-018, 1994 PRL LEXIS *17 (May 16, 1994); *see* 26 U.S.C.A. § 752 (West 1986) (providing for gain or loss on transfers of liabilities).

advantage of Mississippi's newest business entity must, at least, be conscious of this adverse tax consequence, and take necessary steps to minimize gain recognition.

VI. CONCLUSION

The Mississippi Limited Liability Company Act provides a comprehensive framework under which both practitioners and businesses may function. By establishing an Act which by default provides both limited liability and pass-through taxation, the Legislature has brought Mississippi in step with other states which have accepted this exciting new form of business. Companies may now compare the relative advantages and disadvantages of limited liability companies with those of corporations, limited and general partnerships and sole proprietorships in making an informed choice of entity. Admittedly, given the LLCs somewhat recent origins, questions do exist as to certain aspects of the business. For example, disputes exist as to whether an LLC interest should be classified as a security under state and federal securities law.[217] Questions as to when it is possible to pierce the limited liability veil of the company and whether current bankruptcy laws adequately cover LLCs also present themselves for resolution.[218] Although such issues currently pose difficult questions, they are ripe to be resolved by the judiciary in the near future. By doing so, the courts will open the door for even greater expansion of the entity not only throughout Mississippi, but through the rest of the country.

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L. Bradley Dillard

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[217] For a discussion of the LLC interest as a security, see Jeffrey A. Mannisto, Comment, *Mississippi Limited Liability Companies: Potential Exposure Under Federal and State Securities Laws*, 64 MISS. L.J. 173 (1994); Marc I. Steinberg & Karen L. Conway, *The Limited Liability Company as a Security*, 19 PEPP. L. REV. 1105 (1992) (discussing LLC interest as security).

[218] Keatinge et al., *supra* note 5, at 404-06, 445-46.

MISSISSIPPI LIMITED LIABILITY COMPANIES: POTENTIAL EXPOSURE UNDER FEDERAL AND STATE SECURITIES LAWS

I. INTRODUCTION

On March 15, 1994, the Mississippi Legislature approved a new business association, the "limited liability company" (hereinafter LLC).[1] This new entity provides Mississippi promoters with an investment vehicle whereby the generally desirable attributes of pass-through taxation and limited liability for all members may co-exist.[2] Many other jurisdictions have adopted similar LLC legislation, thereby raising the question of whether federal and state securities laws[3] are ap-

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[1] 1994 Miss. Laws ch. 402 (codified at MISS. CODE ANN. § 79-29-101 *et seq.* (Supp. 1994)); *see generally* James A. McCullough, II & L. Bradley Dillard, *The Mississippi Limited Liability Company: A New Choice for Mississippi*, 64 MISS. L.J. 117 (1994).

[2] *See generally* Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 378, 380 (1992).

[3] Federal securities law states that

> [i]t shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security. . . .

15 U.S.C.A. § 77(e)(c) (West 1981). Section 77(d) of the Federal Securities Act, however, provides for several exempted transactions. 15 U.S.C.A. § 77(d) (West 1981). Similarly, section 75-71-401 of the Mississippi Code provides that "it is unlawful for any person to offer or sell any security in the State of Mississippi unless (1) it is registered . . . or (2) the security or transaction is exempted" under the Code. MISS. CODE ANN. § 75-71-401 (1991).

Mississippi securities law is modeled after the Uniform Securities Act. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 307, at 849 n.1 (3d ed. 1983). The Mississippi Uniform Securities Act (hereinafter the "Mississippi Act") contains three basic registration provisions: (1) "Registration of Broker-Dealers, Agents and Investment Advisors"; (2) "Registration of Securities"; and, (3) "Fraudulent and Other Prohibited Practices." MISS. CODE ANN. §§ 75-71-301 to -503 (1991). For an historical overview of the Mississippi Act, see Richard B. Wilson, Jr., Comment, *Selling the Blue Sky in Mississip-*

plicable to the sale of membership interests.[4] The practical importance of the determination of whether LLC interests are "securities" lies in whether a promoter will necessarily incur additional transactional costs.[5]

Other jurisdictions have bridged this gap in securities law coverage in a variety of ways. A few states, taking a direct approach, have modified their existing state blue sky "security" definition to expressly include LLCs.[6] Yet other states have

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pi — A Comparison of the Mississippi Securities Act with the Uniform Securities Act, 35 MISS. L.J. 421 (1964).

[4] Recently, the SEC and several state regulators have filed civil suits, as well as issued cease-and-desist orders, against LLC investment-sales operations, asserting that promoters are using the LLC business form to circumvent securities laws obligations. John R. Emshwiller, *SEC Sets Sights on Certain Limited Liability Companies*, WALL. ST. J., Mar. 31, 1994, at B2. Particularly relevant to Mississippi, "wireless cable" industry investment-sales activities involving LLCs are currently under heavy federal and state regulatory scrutiny. *Id.* Regulators dispute the securities laws exemption claimed by the LLC promoters. *Id.* These promoters argue that these LLC interests are exempt from securities laws because each investor retains an "active management role" in the LLC. *Id.* Regulators, however, argue that the wide-spread solicitation of investments from people with no background in the industry epitomizes why securities laws were developed in the first place. *Id.* The "wireless cable" industry's use of LLCs is a perfect example of the issue examined in this Comment.

[5] *See generally* Bryn Vaaler, *Financing a Small Business in Mississippi: A Practitioner's Guide to Federal and State Securities Exemptions (Part I)*, 63 MISS. L.J. 129, 131-42 (1993). When securities laws come into play, promoters must devote capital to cover added start-up and organizational costs, such as lawyer and accountant due diligence fees, registration fees and other disclosure obligation costs. Under the Mississippi Act, registration statements must include: (1) the prospectus, (2) any sales advertisements or other literature "used in connection with the offering," (3) a "specimen or copy of the security," (4) a copy of any entity governance agreements, (5) an "opinion of counsel as to the legality of the security being registered," (6) specifics as to the sales plan for the security, (7) the issuer's financial statements, and (8) other various items. MISS. CODE ANN. § 75-71-405 (1991).

Additionally, the risk of liability under the anti-fraud provisions of federal and state securities laws further increases transactional costs. For example, engaging in conduct prohibited under the Mississippi Act may result in any of the following sanctions: (1) issuance of a cease-and-desist order by the Secretary of State, (2) imposition of administrative penalties, (3) injunction, or (4) civil penalties. MISS. CODE ANN. § 75-71-715 (1991). Furthermore, buyers may recover "consideration paid for the security" plus interest and attorney's fees when a security is sold in violation of the Mississippi Act. MISS. CODE ANN. § 75-71-717 (1991).

[6] *See, e.g.*, IND. CODE ANN. § 23-2-1-1(k) (Burns Supp. 1994) (amending secu-

addressed the treatment of LLC interests indirectly within their respective LLC acts.[7] At least one state has created a statutory "presumption" which provides that an LLC interest is within the scope of securities laws unless the interest meets certain prescribed criteria.[8] The majority of jurisdictions, however, simply rely on existing federal and state case law to interpret whether new investment schemes fall within the purview of securities laws.[9]

Mississippi has not yet directly addressed whether an interest in an LLC, foreign or domestic, is considered a security. It is therefore the purpose of this Comment to examine the applicability of both federal and Mississippi securities laws to LLCs formed under the Mississippi LLC Act.[10] To do so, this

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rity definition to include interest in limited liability company including any fractional or other interest); N.M. STAT. ANN. § 58-13B-2.V (Michie Supp. 1994) (including within security definition "any interest in a limited liability company"); OHIO REV. CODE ANN. § 1707.01(B) (Anderson Supp. 1994) (expanding term "security" to include "membership interests in limited liability companies").

Indiana and New Mexico, however, provide qualifying language which calls for a more case-specific analysis. IND. CODE ANN. § 23-2-1-1(k)(iii) (Burns Supp. 1994) (exempting from security definition "an interest in a [LLC] if the person claiming that the interest is not a security can prove that all of the members of the [LLC] are actively engaged in [its] management"); N.M. STAT. ANN. § 58-13B-2.V (Michie Supp. 1994) (qualifying definitional listing of security items with language "unless the context requires otherwise").

[7] *See, e.g.*, GA. CODE ANN. § 14-11-1107(n) (1994) (stating "[n]othing in this chapter shall be construed as establishing that a limited liability company interest is not a 'security' within the meaning" of Georgia statutory definition of security); KAN. STAT. ANN. § 17.126(L)(1) (Supp. 1993) (providing exemption for offer or sale of LLC interests when issuer has not sold more than twenty interests in preceding twelve month period); MICH. COMP. LAWS ANN. § 450.5103 (West Supp. 1994) (providing that LLC interests are "securit[ies] to the same extent as an interest in a corporation, partnership, or limited partnership [are] securit[ies]").

[8] *See, e.g.*, WIS. STAT. ANN. § 551.02(c) (West Supp. 1994) (presuming that LLC interests are securities only "if the right to manage the [LLC] is vested in one or more managers or if the aggregate number of members . . . exceeds 35"). Wisconsin, however, does provide that LLCs are not securities "if the aggregate number of members of the [LLC] . . . does not exceed 15 and the right to manage the [LLC] is vested in its members." WIS. STAT. ANN. § 551.02(b) (West Supp. 1994).

[9] Reliance on case law, generally, is a stop gap measure. During this time period, the legislature may evaluate the new investment scheme and determine whether it is sufficiently unique to warrant a statutory amendment.

[10] It should be noted that foreign LLCs conducting sales activities within Mis-

Comment will first provide a brief overview of what constitutes a "security." Then, due to the absence of specific Mississippi judicial or legislative guidance on this issue, this Comment will utilize various "traditional" securities law classification tests to examine the likely treatment of a Mississippi LLC under applicable securities laws.

II. WHAT IS A "SECURITY"?

Limitations on federal and state securities law coverage hinge on the definition of a "security" as expressed in the respective statutes.[11] The Securities Act of 1933 (hereinafter the "Federal Act") defines a "security" as:

> [A]ny note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege . . . entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.[12]

Accordingly, an investment scheme must fall within at least one of these statutorily delineated categories before it comes within the ambit of the applicable securities laws.[13] Consistent

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sissippi must comply with section 75-71-401 of the Mississippi Code. MISS. CODE ANN. § 75-71-401 (1991). Thus, the scope of this Comment is broader than a mere analysis of the treatment of Mississippi LLCs. *See* MISS. CODE ANN. § 79-29-1008 (Supp. 1994) (detailing types of LLC transactions which do not constitute "transacting business" within Mississippi).

[11] *See* L. Keith Parsons, *A Review of Interpretive Opinions and Enforcement Proceedings Under the Mississippi Securities Act*, 12 MISS. C. L. REV. 179, 181-82 (1991).

[12] 15 U.S.C.A. § 77(b)(1) (West Supp. 1994).

[13] *See generally* 1 THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION §

with the Federal Act, Mississippi's Uniform Securities Law (hereinafter the "Mississippi Act") defines a "security" to include:

> *[A]ny* note; stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; . . . investment contract; voting trust certificate; certificate of deposit for a security; . . . interest in a limited partnership; or, in general, any interest or instrument commonly known as a "security."[14]

Generally, jurisdictions look to the underlying characteristics of the proposed investment scheme in order to determine whether an investment is within the definition of security under the applicable securities laws.

Federal securities law is useful in construing the definition of "security" under the Mississippi Act since the Mississippi Act was modeled after the definition contained in both the Securities Act of 1933 and the Securities Exchange Act of 1934.[15] Furthermore, the drafters of the Uniform Securities Act desired uniformity between federal and state definitions of "security."[16] In Mississippi, interpretive case law, although relatively scarce, indicates that both the Mississippi Secretary of State and Mississippi courts will look to federal law for guidance in construing the definition of "security."[17]

As previously stated, an interest in an LLC is not covered expressly under either the Federal Act or the Mississippi Act.[18] Thus, a Mississippi LLC investment scheme must fall within one of the "catch-all" categories of the Federal and/or Mississippi Acts before compliance with the respective security

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1.5 (2d ed. 1990).

[14] MISS. CODE ANN. § 75-71-105(l) (1991) (emphasis added).

[15] *See* Parsons, *supra* note 11, at 181-82.

[16] *See id.* at 182.

[17] *Id.* at 182-83; *see* State v. Russell, 358 So. 2d 409, 412 (Miss. 1978) (holding sale of negotiable promissory note outside scope of Mississippi blue sky laws); Producers Feed Co., Op. Miss. Sec. State (Aug. 24, 1990) (interpreting common stock and patronage equities of farmer's cooperative outside definition of security under Mississippi Act).

[18] *See supra* notes 11-17 and accompanying text.

regulations will be required. These "catch-all" categories include "investment contract," "stock," or "investment commonly known as a security."[19]

III. Classification of Membership Interests Under the *Howey* Test

In the landmark case of *SEC v. Howey Co.*,[20] the United States Supreme Court delineated the preferred analysis applicable to the catch-all "investment contract" category.[21] Although undefined under existing blue sky laws, the pre-statutory meaning of "investment contract" commonly is attached to federal and state securities laws.[22] Consequently, the standard for "investment contracts" under *Howey* is met when the following four requirements are satisfied: (1) "the scheme involves an investment," (2) "of money," (3) "in a common enterprise," (4) "with profits to come solely from the efforts of others."[23]

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[19] *See supra* notes 11-14 and accompanying text.

[20] 328 U.S. 293, *reh'g denied*, 329 U.S. 819 (1946).

[21] *See* Marc I. Steinberg & Karen L. Conway, *The Limited Liability Company as a Security*, 19 Pepp. L. Rev. 1105, 1107 (1992). In *Howey*, the United States Supreme Court held that the offering of individual land sales contracts for plots within a citrus grove, coupled with certain "optional" service contracts, constituted an "investment contract" under the Federal Act. *Howey*, 328 U.S. at 295-99. In so holding, the Court applied a rule of substance over form, stating that the fact that the investment interests were evidenced by land sales contracts and warranty deeds was immaterial. *Id.* at 298, 300.

Currently, Mississippi's blue sky regulations, adopted by the Secretary of State, include a definition of "investment contract" which is very similar to the standard as established by the United States Supreme Court in the *Howey* case. R103(H), 2 Blue Sky L. Rep. (CCH) ¶ 34,403, at 29,402. The Mississippi regulation states, "'Investment [c]ontract' shall mean and include any interest or participation in a contract, transaction, scheme, common enterprise, or profit-seeking venture whereby a person invests therein and looks primarily to the promoter or a third party for the financial success of such venture." *Id.*

[22] *Howey*, 328 U.S. at 298. The Court stated that the statutory term "investment contract" should receive its pre-statutory judicial construction. *Id.* The pre-statutory definition uniformly applied by state courts was "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *Id.* (quoting State v. Gopher Tire & Rubber Co., 177 N.W. 937, 938 (Minn. 1920)).

[23] *Id.* at 301. The *Howey* Court indicated that this judicial standard was intentionally a "flexible" test "capable of adaption to meet the countless and vari-

The characteristics of a traditional LLC investment scheme generally will fail to raise interpretive questions with respect to the first three requirements of the *Howey* standard. First, selling an LLC membership interest for cash, goods or services[24] will be sufficient to establish an investment of money, thus satisfying the first element of the *Howey* test.[25] Second, most LLC organizational structures typically provide for a pooling of all investors' interests for the common goals of profit making and investment risk sharing.[26] This type of organizational

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able schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 299.

Specifically, the Court seemed to rely on specific characteristics of the citrus grove investment scheme including: (1) the investment was for "something more than fee simple interests in land . . . coupled with management services," (2) the offering was made to non-local persons, (3) the offerees as a group lacked experience in citrus operations, (4) the offerees generally had no desire to occupy or develop the land individually, and (5) individual development of the plots was not economically feasible. *Id.* at 299-300.

[24] The Mississippi LLC Act does not place any restrictions on the form of membership contributions to the LLC. *See* MISS. CODE ANN. § 79-29-501 (Supp. 1994) (stating "contribution of a member may be in cash, property, services rendered, or a promissory note or other obligation to contribute cash or property or to perform services"); *see also* FLA. STAT. ANN. § 608.4211 (West Supp. 1994) (providing that "[t]he contribution of a member may be in cash, property, or services, or a promissory note or other obligation to contribute cash or property or to perform services").

[25] *See* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 560 (1979). Generally, investors need only give "some tangible and definable consideration" to satisfy this element. *Daniel*, 439 U.S. at 560. In *Daniel*, the Court held that employer contributions to an employee pension plan did not constitute an "investment of money." *Id.* at 560-61. Although an employee exchanges part of his or her labor for this benefit, the *Daniel* Court found that the "economic realities" of the transaction are not sufficient to support a finding that the employer's contributions rose to the level of "an investment by the employee." *Id.* at 561. *But see* Harris v. Republic Airlines, Inc., [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,772, at 98,626 (May 18, 1988) (holding that explicit and significant wage concessions in exchange for shares of stock constitute "investment of money" for securities laws purposes).

[26] The Mississippi LLC Act provides, unless otherwise stated in the particular LLC operating agreement, for a pro rata allocation of profits, losses and other distributions based on the value of capital contributions. MISS. CODE ANN. §§ 79-29-503 to -504 (Supp. 1994).

The Mississippi LLC Act apparently provides that as few as one person may hold an interest in a Mississippi LLC, as the statute fails to expressly address the issue and provides for formation by "any person" and management by "one or

structure exemplifies the horizontal commonality necessary to satisfy the *Howey* requirement of a "common enterprise."[27] Finally, nearly all investors invest in LLC enterprises with the expectation of capital appreciation and/or the intent to participate in the earnings of the LLC, thus meeting the requirement of "expectation of profits."[28] Therefore, courts should invariably find that the vast majority of Mississippi LLC arrangements meet the first three prongs of the *Howey* test.[29] Application of the fourth prong of the *Howey* test, however, raises the crux of the interpretative issue in the context of Mississippi LLCs.

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more managers." MISS. CODE ANN. §§ 79-29-205, -401 (Supp. 1994). The lack of statutory minimum members and/or promoters requirement, however, does not complicate the analysis of a Mississippi LLC, as the Ninth Circuit has stated that "even a venture that has but a single investor can be a common enterprise if the promoter's remuneration depends on the success of the enterprise." Hocking v. Dubois, 839 F.2d 560, 566 (9th Cir. 1988), *cert. denied*, 494 U.S. 1078 (1990).

[27] *See* SEC v. Continental Commodities Corp., 497 F.2d 516, 522 (5th Cir. 1974). Pro rata allocations are not essential; rather, the courts should merely focus on the "uniformity of impact of the promoter's efforts." *Id.*

In *Continental Commodities*, the Fifth Circuit defined "common enterprise" as "one in which the fortunes of the investor are interwoven with and dependant upon the efforts and success of those seeking the investment or of third parties." *Id.* (quoting SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 478 (5th Cir. 1974)). For further discussion of the issue, see 2 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 927-35 (3d ed. 1989).

[28] *See* United Hous. Found. v. Forman, 421 U.S. 837, 852, *reh'g denied*, 423 U.S. 884 (1975). In *Forman*, the Court held that a housing cooperative in New York City failed the third prong of the *Howey* test because the primary reason for investment was to acquire a place to live and not to receive "financial returns." *Forman*, 421 U.S. at 853.

In the Fifth Circuit there remains an unsettled question of whether the expectation of the tax benefits alone may satisfy this requirement. *See* Long v. Shultz Cattle Co., 881 F.2d 129, 132 n.2 (5th Cir. 1989) (implying that enjoyment of tax benefits alone may satisfy expectation of profit element), *reh'g denied*, 896 F.2d 85 (5th Cir. 1990). *But see* Guidry v. Bank of LaPlace, 954 F.2d 278, 284 (5th Cir. 1992) (implying that enjoyment of tax benefits alone does not satisfy expectation of profit element).

[29] Commentators generally agree that the first three prongs of the *Howey* test will not pose significant interpretative questions in the LLC context. *See* Keatinge, *supra* note 2, at 403-04 (expressing greatest concern is with fourth prong of *Howey* test); Mark A. Sargent, *Are Limited Liability Company Interests Securities?*, 19 PEPP. L. REV. 1069, 1096 (1992) (same); Steinberg & Conway, *supra* note 21, at 1107-10 (same).

In determining whether a new LLC investment scheme meets the fourth *Howey* requirement, courts frequently will draw on the findings and conclusions reached in the resolution of this issue in the analogous context of partnership law.[30] Within the partnership context, the analysis begins with a set of presumptions. General partnership interests ordinarily are presumed not to be securities, because ultimate control over the entity remains with the individual investors in their capacities as general partners pursuant to statutory authority.[31] Conversely, limited partnership interests are presumptively considered to be securities since applicable statutory authority precludes limited partners from exercising control over the entity.[32]

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[30] *See* Keatinge & Ribstein, *supra* note 2, at 404; Sargent, *supra* note 29, at 1097; Steinberg & Conway, *supra* note 21, at 1110-13.

[31] *See* Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 240 (4th Cir. 1988) (finding that "[g]eneral partnership interests ordinarily are not considered investment contracts because they grant partners — the investors — control over significant decisions of the enterprise"); Youmans v. Simon, 791 F.2d 341, 346 (5th Cir.) ("A strong presumption remains that a general partnership or joint venture interest is not a security. A party seeking to prove to the contrary must bear a heavy burden of proof."), *reh'g denied*, 795 F.2d 84 (5th Cir. 1986); Alexandria Assoc., Ltd. v. Mitchell Co., 800 F. Supp. 1412, 1417-18 (S.D. Miss. 1992) (stating that "[g]eneral partnership interests . . . do not usually come within the definition of 'investment contract'"), *rev'd*, 2 F.3d 598 (5th Cir. 1993).

This presumption is based upon the theory that securities laws protection is not necessary in cases where the investor had control of the business. *Youmans*, 791 F.2d at 346 (explaining that owners of general partnership interests are "entrepreneurs, not investors," capable of protecting their interests by taking active part in management and therefore do not need added protection of securities laws). For example, participants in a Mississippi general partnership may choose to take part in all management decisions on a day-to-day basis or alternatively may delegate the day-to-day decisions to a management group while retaining ultimate managerial control. *See* MISS. CODE ANN. § 79-12-35(1)(e) (1989) (stating that, unless otherwise agreed, "[a]ll partners have equal rights in the management and conduct of the partnership business").

[32] *See, e.g.*, L&B Hosp. Ventures, Inc. v. Healthcare Int'l, Inc., 894 F.2d 150, 151 (5th Cir.) (stating that generally "investment contracts include limited partnership interests"), *cert. denied*, 498 U.S. 815 (1990). Furthermore, the Mississippi Act, but not the Federal Act, specifically includes an "interest in a limited partnership" in its definition of "security." MISS. CODE ANN. § 75-71-105(l) (1991); *see supra* note 14 and accompanying text.

The statutory prohibition barring limited partners from participating in the

These seemingly straight-forward presumptions, however, are complicated by the fact that the mere label placed on a particular transaction is not controlling. In the partnership context the courts have looked through nominal characterizations and examined the "economic realities" of the investment.[33] Specifically, the courts will examine the control characteristics of a particular partnership investment in order to determine whether it more closely resembles an interest in a general partnership or a limited partnership.[34] For example, in Mississippi as well as many other jurisdictions, a general partnership that merely establishes a management group does not automatically satisfy the *Howey* requirement of "solely from the efforts of others" when control of this management group remains the ultimate responsibility of each and every partner.[35]

Under this "economic realities" analysis, the requirement "solely from the efforts of others" is dependant upon the level of business control retained by each of the respective partners.[36]

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management of the partnership formed the basis for this presumption. *See* MISS. CODE ANN. § 79-14-303 (1989) (stating that limited partner sacrifices limited liability status if "he participates in the control of the business"). Inclusion of the term "limited partnership" within the definition of "security" in the Mississippi Act, however, does not foreclose the issue with respect to limited partnerships. *See infra* notes 33-40 and accompanying text.

[33] *See* Williamson v. Tucker, 645 F.2d 404, 422 (5th Cir.) (stating that "mere fact that an investment takes the form of a general partnership or joint venture does not inevitably insulate it from the reach of federal securities laws"), *cert. denied*, 454 U.S. 897 (1981).

[34] *See, e.g.*, Siebel v. Scott, 725 F.2d 995, 999 (5th Cir.) (holding that since limited partners relied on managerial skills of general partners to produce profit, securities laws applied to sales transaction between limited and general partners), *cert. denied*, 467 U.S. 1242 (1984); Frazier v. Manson, 651 F.2d 1078, 1081 (5th Cir. 1981) (holding that limited partnership interests were not investment contracts under *Howey* because limited partners themselves were involved in "management and profitability of the limited partnership"); Stewart v. Germany, 631 F. Supp. 236, 240 (S.D. Miss. 1986) (denying summary judgement, instructing that general partnership agreement must be further examined in order to determine whether "partners' powers are synonymous with those of a limited partner").

[35] *See, e.g., Williamson*, 645 F.2d at 422-24 (holding that general partnership interest was not security, despite fact that partnership agreement provided for management group, because ultimate control remained vested with partners and partners were capable of managing business).

[36] *See* Keatinge & Ribstein, *supra* note 2, at 404. In the landmark case of

The Fifth Circuit stated that the "solely from the efforts of others" requirement will be satisfied when the efforts are "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[37] In the leading case of *Williamson v. Tucker*,[38] the Court of Appeals for the Fifth Circuit delineated several factors which indicate when an investor is incapable or is too inexperienced to meaningfully exercise his powers in the entity.[39] Accordingly, the fourth prong of *Howey* is satisfied, in the partnership context at least, upon establishment of any of the following:

> [T]hat (1) an agreement among parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.[40]

Mississippi LLCs possess several of the Mississippi partnership characteristics which are important under the *Howey* analysis. First, existing Mississippi statutes provide extremely

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SEC v. Glenn W. Turner Enterprises, Inc., the Ninth Circuit adopted a broad and flexible interpretation of this requirement. SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 (9th Cir.), *cert. denied*, 414 U.S. 321 (1973). This broad, flexible interpretation effectively eliminated the word "solely" from the requirement. *Turner*, 474 F.2d at 482. The court rationalized that a strict reading of the requirement could lead to circumvention of the securities laws protection by simple provisions in the investment scheme requiring an investor to contribute some "modicum of effort." *Id.*

[37] SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 483 (5th Cir. 1974) (quoting *Turner*, 474 F.2d at 482).

[38] 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981).

[39] *Williamson*, 645 F.2d at 424. The Fifth Circuit adopted the *Turner* interpretation in the case of *Williamson*. *Id.* In so holding, the *Williamson* court stated that the person seeking securities laws protection had the heavy burden of demonstrating that he was so dependant on a particular promoter/manager that he could not "replace him or otherwise exercise ultimate control." *Id.*

[40] *Id.*

flexible governance formats for both types of entities.[41] Of particular importance is the fact that, similar to the Mississippi general partnership statute,[42] the Mississippi LLC Act specifically provides that members will manage the LLC unless the certificate of formation provides otherwise.[43] Furthermore, this centralized management option likely will be exercised on a somewhat limited basis, since entities possessing the corporate characteristic of centralized management may be ineligible for pass-through taxation treatment under the Internal Revenue Code.[44] Finally, the typical general partnership investor is no

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[41] Mississippi law grants both LLCs and partnerships wide discretion in managing the affairs of the entity, but such laws provide that this wide discretion may be further regulated by agreement. *See* MISS. CODE ANN. § 79-29-306(1) (Supp. 1994) (providing that LLC members "may enter into a[n LLC] agreement to regulate or establish the affairs of the [LLC], the conduct of its business and the relations of its members"); *cf.* MISS. CODE ANN. § 79-12-35(1) (1989) (providing that all partners may participate equally in managing and conducting business in accordance with agreement between them and such agreement may not be contravened without consent of all partners); MISS. CODE ANN. § 79-14-403 (1989) (stating that "general partner[s] of a limited partnership have the rights and powers and [are] subject to the restrictions of a partner in a partnership without limited partners" except as otherwise provided in partnership agreement); MISS. CODE ANN. § 79-14-302 (1989) (providing that partnership agreement may grant limited partners right to vote on any matter).

[42] *See supra* note 31 and accompanying text.

[43] MISS. CODE ANN. § 79-29-302 (Supp. 1994). LLC management may be delegated to one or more managers under the Mississippi LLC Act. MISS. CODE ANN. § 79-29-401(1) (Supp. 1994) (stating that "certificate of formation of a[n LLC] may delegate responsibility for managing a[n LLC] to or among one or more managers").

[44] For a discussion of the tax treatment of LLCs, see McCullough & Dillard, *supra* note 1, at 157-67; Sargent, *supra* note 29, at 1097-98

Initially, the Internal Revenue Service issued broad rulings classifying all organizations operating under a particular state's LLC act as partnerships for federal tax purposes. *See, e.g.*, Rev. Rul. 88-76, 1988-2 C.B. 360, 361 (classifying organizations operating under Wyoming LLC Act—first state to adopt LLC legislation—as partnerships for federal tax purposes); Rev. Rul. 93-53, 1993-2 C.B. 312, 314 (classifying LLCs formed under Florida's statute as partnerships for federal tax purposes); Rev. Rul. 94-5, 1994-2 I.R.B. 21, 23 (classifying LLCs formed under Louisiana statute as partnerships for federal tax purposes). More recently, however, the Service has classified LLCs formed under a particular statute on a case-by-case basis, as opposed to a statute-by-statute approach, due to the recent statutory trend providing broad flexibility in structuring LLCs. *See, e.g.*, Rev. Rul. 93-38, 1993-1 C.B. 233, 255 (holding that Delaware LLC statute "contains numerous

more or less sophisticated than the average LLC member.[45]

Based on the foregoing similarities, it is reasonable to assume that, absent the existence of any *Williamson* type factors,[46] a member-managed Mississippi LLC will receive the same presumptive treatment as a general partnership interest under the *Howey* test. Additionally, the presence of any of the *Williamson* factors or the alteration of the Mississippi LLC Act default provisions, such as providing for centralized management, should raise a "red flag" to promoters that the LLC investment scheme may be considered an "investment contract" under *Howey*. However, determining whether a particular LLC satisfies any of the factors articulated in *Williamson* probably will be limited to a case-by-case analysis, since the determination turns on the relative experience levels of promoters/managers and members.[47]

It should be noted, furthermore, that a presumption that a member-managed LLC is not an "investment contract" does not totally preclude the possibility of securities laws protection for LLC members. Rather, it places the burden upon the member to show the existence of extreme circumstances, such as dependence on the skills and knowledge of the management to generate profits, before one may avail himself of securities laws protections.[48] Additionally, the provision of a few regulatory generalizations in the LLC context will have the added effect of

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provisions that can be modified by an LLC agreement; accordingly, depending on the provisions of the LLC agreement, a Delaware LLC can assume the characteristics either of a corporation or of a partnership for federal tax purposes"); Rev. Rul. 94-6, 1994-3 I.R.B. 11, 13 (refusing to generally classify Alabama LLC statute due to broad flexibility in Alabama's statute).

[45] Securities laws are intended to provide protection for investors who are otherwise incapable of protecting their interests, such as less sophisticated investors and those forced to rely on the managerial or entrepreneurial skills of others. *See* Sargent, *supra* note 29, at 1100-01.

[46] *See supra* notes 39-40 and accompanying text.

[47] *See* Dennis S. Karjala, *Federalism, Full Disclosure, and the National Markets in the Interpretation of Federal Securities Law*, 80 NW. U. L. REV. 1473, 1511 (1986) (commenting that practical downside of *Williamson*'s factual analysis is fact that "courts are likely to get bogged down" in determining relative experience levels of parties).

[48] *Williamson*, 645 F.2d at 424.

increasing regulatory certainty for promoters while simultaneously decreasing the related transactional costs.[49]

IV. APPLICATION OF *MARINE BANK V. WEAVER*

The *Howey* test may not always be the appropriate test to apply in analyzing whether a new investment scheme constitutes an "investment contract" under applicable securities laws. In limited situations, the *Marine Bank v. Weaver*[50] analysis has been applied as an alternative to the *Howey* test.[51] This part of the Comment, therefore, will examine the *Weaver* analysis for applicability in the Mississippi LLC context.

In *Weaver*, the United States Supreme Court held that neither a federally-insured certificate of deposit nor a profit-sharing agreement was a "security" under federal securities laws.[52] In reversing the Third Circuit's finding that both instruments might be securities, the *Weaver* Court, alternatively, found that certain investment schemes were precluded from the *Howey* analysis based on the introductory language to the definition of security contained in the Federal Act.[53] Specifical-

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[49] The transactional costs of investments will increase as more promoters must incur added lawyer and accountant fees related to due diligence work required to establish whether the particular LLC is an "investment contract." *See* Sargent, *supra* note 29, at 1102-03; Vaaler, *supra* note 5, at 131-36.

[50] 455 U.S. 551 (1982).

[51] *See, e.g.*, Mace Neufeld Prods., Inc. v. Orion Pictures Corp., 860 F.2d 944, 946-47 (9th Cir. 1988) (holding contract to assume production of television series involving right to receive future profits not investment contract within scope of "security"); Bank of Am. Nat'l Trust & Savs. Ass'n v. Hotel Rittenhouse Assocs., 595 F. Supp. 800, 805 (E.D. Pa. 1984) (holding promissory note and developer's limited partnership agreement not within scope of federal securities laws because documents were not "the subject of common trading").

[52] *Weaver*, 455 U.S. at 555. In *Weaver*, a federally insured certificate of deposit owned by the Weavers was pledged to Marine Bank to guarantee a loan made by the bank to a meat packing company. *Id.* at 552-53. In exchange for this third party guarantee, the owners of the meat packing company entered into a profit-sharing arrangement with the Weavers, whereby the Weavers would receive 50% of the meat packing company's profits plus $100 per month until released from the guarantee. *Id.* at 553.

[53] *Id.* at 554-55. The *Weaver* Court reasoned that the broad federal remedies available under securities laws were not intended by Congress to be available in all cases just because the particular investment type is expressly mentioned in

ly, this precursory language provided that investment schemes did not constitute securities "if 'the context otherwise requires,'" notwithstanding the fact that the securities laws definitions enumerated the particular investment scheme.[54]

The *Weaver* Court analyzed the certificate of deposit and the profit-sharing agreement separately under applicable securities laws.[55] First, the Court examined the certificate of deposit, distinguishing between federally-insured certificates of deposit and other long-term debt instruments.[56] The *Weaver* Court reasoned that the investor protection purpose of applicable securities laws became unnecessary when an investment is afforded federal insurance protection provided by the FDIC.[57]A

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the Federal Act. *Id.* at 556; *see, e.g.*, Bellah v. First Nat'l Bank, 495 F.2d 1109, 1114 (5th Cir. 1974) (explaining that Federal Act provides note makers "a broad but nevertheless not boundless federal forum for vindicating their grievances"). Specifically, the Federal Act uses the language "[w]hen used in [federal securities laws], *unless the context* otherwise requires" to limit an otherwise broad defunction of security. 15 U.S.C.A. § 77b (West 1981 & Supp. 1994) (emphasis added). The Mississippi Act contains comparable language regarding the definition of "security," stating that "[f]or the purposes of [securities laws] the following words shall have the following meanings *unless the context* shall prescribe otherwise . . . . " MISS. CODE ANN. § 75-71-105 (1991) (emphasis added).

The Third Circuit expressed the need to narrow the scope of certain instruments enumerated in the federal securities laws, stating that there is "some necessity for fine tuning the definition of 'note' to avoid sweeping within the coverage of [federal securities laws] every consumer and business loan financing current operational costs." Ruefenacht v. O'Halloran, 737 F.2d 320, 325 (3d Cir. 1984) (citing Lino v. City Investing Co., 487 F.2d 689, 694-95 (3d Cir. 1973)). The Third Circuit applied the context clause argument in so narrowing the definition of "note." *Ruefenacht*, 737 F.2d at 326-27.

[54] *Weaver*, 455 U.S. at 556. This approach, known as the "context clause" analysis, has been widely criticized by commentators as being too broad and unworkable. *See, e.g.*, LOSS & SELIGMAN, *supra* note 27, at 928-29 n.130; Park McGinty, *What is a Security?*, 1993 WIS. L. REV. 1033, 1065 (stating that "application of the context clause seemed to justify excluding virtually anything"); Marc I. Steinberg & William E. Kaulbach, *The Supreme Court and the Definition of "Security": The "Context" Clause, "Investment Contract" Analysis, and Their Ramifications*, 40 VAND. L. REV. 489, 504-18 (1987) (discussing ramification of Context Clause). According to one commentator, the *Weaver* approach was an attempt to limit the application of securities law anti-fraud provisions to those investment schemes capable of being traded in financial markets. *See* McGinty, *supra*, at 1066 n.154.

[55] *Weaver*, 455 U.S. at 556-60.

[56] *Id.* at 558.

[57] *Id.* The Court noted that "nearly all depositors insured by the FDIC have

prominent commentator has suggested that this portion of the *Weaver* analysis seems to result in an additional test, independent of *Howey*, which may be capable of trumping any result reached under the *Howey* analysis when certain limited factual conditions are present.[58] Specifically, in the context of classifying new investment schemes, *Weaver* could be considered a "fifth prong" in the *Howey* test.[59]

At least one court has adopted this "fifth prong" theory, stating that under *Howey* an investment scheme is an investment contract when "a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of the promoter or a third party . . . and (5) risks loss."[60] This "fifth prong" seemingly would require that the investor bear at least some risk of loss before a particular investment scheme is deemed an "investment contract." If ap-

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received payment in full" dating back to the inception of the FDIC in 1933. *Id.* The United States Supreme Court criticized the Third Circuit for failing to give appropriate weight to this factor. *Id.* Commentators have suggested that *Weaver* stands for the limited proposition that "where there is another investor protection or risk-reducing scheme, a security is less likely to be found." Carl W. Schneider, *The Elusive Definition of a "Security" — 1990 Update*, 24 SECURITIES & COMMODITIES REGULATION 18 (Standard & Poor's Corp. Jan. 23, 1991).

[58] *See* MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES, § 4A.04[2] (1984). In reconciling *Weaver*, Professor Steinberg states that *Howey*, rather than *Weaver*, should ultimately control, as *Weaver* is merely an extension of the widely accepted *Howey* test. *Id.* Professor Steinberg therefore suggests a different approach to *Weaver*, attempting to better articulate the interface of *Howey* and *Weaver*. *Id.* Specifically, he states that:

> an instrument will not be deemed an investment contract, irrespective of the *Howey* test, if: (1) the transaction involves a novel or unique instrument (2) which is not capable of mass distribution or public trading (3) where no prospectus has been distributed *and* (4) the transaction is negotiated privately involving few individuals.

Id. (emphasis in original). Under this interpretation, all of the stated factors must be met by any single transaction before *Weaver* may be applicable. *Id.*

[59] *See* STEINBERG, *supra* note 58, § 4A.04[2].

[60] Dooner v. NMI Ltd., 725 F. Supp. 153, 158 (S.D.N.Y. 1989) (quoting Securities & Exch. Comm'n v. Howey Co., 328 U.S. 293, 295-99 (1946), and citing *Weaver*, 455 U.S. at 557-59); *see also* STEINBERG, *supra* note 58, § 4A.04[2] (supporting same). In *Dooner*, the court determined that the limited partnership interest satisfied the five factors of the "investment contract" test, specifically finding that Dooner was "exposed to a risk of loss." *Dooner*, 725 F. Supp. at 160.

plied to LLCs, the "fifth prong" interpretation enunciated in *Dooner* probably will not provide a judicial exclusion from securities since the typical LLC interest will not possess a risk of loss on par with the relatively risk-free level of a federally-insured certificate of deposit.[61]

The *Weaver* Court next examined the profit-sharing agreement. Although the profit-sharing agreement therein seemed to satisfy all the *Howey* factors, the Court refused to apply the *Howey* test.[62] In declining to do so, the *Weaver* Court relied on the relatively private nature of the investment agreement.[63] The Court, therefore, dictated several factors that should be considered under this approach:[64] whether the transaction in question was negotiated on a "one-on-one" basis;[65] whether information regarding the interests had not been publicly disseminated;[66] and finally, whether a secondary market for the

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[61] Alternatively, the author of one article presents a persuasive case that the "context clause" analysis may be useful to exclude instruments from the definition of security "because it is not within the spirit of the acts or the intention of the drafters," but the author concedes that the analysis must be rephrased before it will be useful to practitioners. Sue A. Dillport, *Restoring Balance to the Definition of Security*, 10 SEC. REG. L.J. 99, 140 (1982).

[62] *Weaver*, 455 U.S. at 559. Previously, the Third Circuit had held that the agreement constituted an "investment contract" under *Howey* because profits were to be realized from the efforts of the meat packing company owner's efforts, as opposed to the Weavers'. *Id.*

[63] *Id.* at 559. The Court found that "unusual instruments found to constitute securities in prior cases involved offers to a number of potential investors, not a private transaction as in this case." *Id.*

[64] *Id.* at 559-60. The Court found that the unique and personalized terms of the agreement, coupled with the fact that investment literature was never distributed, indicated that the agreement was never intended to be publicly traded by the parties. *Id.* at 560. Specifically, the agreement contained the provision that the Weavers could use a barn and pasture owned by the meat packing company owners. *Id.* The Weavers were also given the right to prevent the meat packing company owners from entering into future loan obligations. *Id.*

[66] *Id.* at 556-60. The Court reasoned that a "security is an instrument in which there is 'common trading,'" illustrating this point with examples, such as the fact that 42 persons purchased interests in *Howey*. *Id.* at 559-60. The Court implied that "common trading" was lacking in the Weavers' case as the profit-sharing agreement was negotiated "one-on-one." *Id.* at 560.

[66] *Id.* at 560. The Court distinguished the fact that prospectus information was sent to over one thousand potential investors for oil lease investment in SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 346 (1943), from the fact that no

interest is relatively nonexistent.[67]

For Mississippi LLC purposes, however, consideration should be given to the portion of the *Weaver* analysis relating to the treatment of the profit-sharing agreement before reaching the conclusion that a particular LLC interest is not an "investment contract." Therefore, when the terms of a particular Mississippi LLC investment scheme foreclose the possibility of any public trading or marketing,[68] the LLC investment scheme may create a "context" worthy of judicial exclusion under *Weaver*.[69] Conversely, when the terms of a particular Mississippi LLC investment scheme are such that it is capable of being offered on a mass-marketing scale, or when a definable secondary market exists, then the *Weaver* analysis likely will be immaterial in the final determination of whether the LLC investment scheme constitutes an "investment contract" under the conventional *Howey* analysis.

V. Qualification Under Other Catch-all Categories

As previously discussed, LLC investment schemes potentially may fall within the purview of at least two security catch-all categories other than "investment contract." This portion of the Comment will examine the definitional category of "stock" and the true catch-all category of "any interest or instrument commonly known as a security."[70]

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prospectus information was sent in the *Weaver* case. *Weaver*, 455 U.S. at 559-60.

[67] *Weaver*, 455 U.S. at 560. The Court stated that the agreement was unique and "not designed to be traded publicly." *Id.*

[68] There may be limited situations where the terms of the particular LLC agreement are so uniquely tailored to the investors that an investor would be hard pressed to find another willing buyer.

[69] *Weaver*, 455 U.S. at 559.

[70] *See supra* notes 10-14 and accompanying text.

A. Category of "Stock"

With respect to the category of "stock," the test promulgated by the United States Supreme Court in *Landreth Timber Co. v. Landreth*,[71] generally is accepted.[72] *Landreth* held that instruments denominated "stock" and which possessed the "usual characteristics" of such are within the scope of the Federal Securities Act.[73] The characteristics under the *Landreth* analysis "usually associated with common stock" include: "(i) the right to receive dividends contingent upon apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value."[74] Courts have found the *Landreth* approach applicable to an investment interest not specifically denominated "stock" on its face, and therefore consideration is given to the applicability of this approach in the context of Mississippi LLC interests.[75]

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[71] 471 U.S. 681 (1985).

[72] *Landreth*, 471 U.S. at 686. In *Landreth*, owners of an incorporated sawmill operation offered all of the corporation's stock for sale through brokers. *Id.* at 683. Although the sawmill was subsequently damaged by fire, the sawmill owners still continued with their stock sales efforts. *Id.* A stock purchase agreement was executed, providing for the mill to be rebuilt and the sellers to remain for some time as consultants. *Id.* Ultimately, the rebuilding efforts failed. *Id.* at 684. The purchasers sought relief under federal securities laws, claiming that the buyers had misrepresented material facts as to the worth of the sawmill operation. *Id.* The lower court held that federal securities laws protections are not available for corporate stock sales transactions involving 100% of the stock of a closely held corporation. *Id.*

[73] *Id.*

[74] *Id.* (citing United Housing Found. v. Forman, 421 U.S. 837, 851 (1975)).

[75] *See, e.g.*, Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557, 1580-81 (10th Cir. 1990) (holding that under *Landreth*, fractional undivided working interest in coal mining operation was "security" for federal securities laws purposes); One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1288 (D.C. Cir. 1988) (holding under *Landreth* that option to purchase corporate stock was security for securities laws purposes); Penturelli v. Spector, Cohen, Gadon & Rosen, 779 F.2d 160, 164-67 (3d Cir. 1985) (holding under *Landreth* that fractional undivided working interest in coal mining operation was "security" for federal securities laws purposes).

The primary consideration is the substance of the transaction. *See Forman*, 421 U.S. at 850 (applying policy of substance over form when construing whether investment scheme is considered "stock"); Schneider, *supra* note 57, at 20 (com-

These factors are easily applied in the context of a Mississippi LLC. Three of these factors — the right to receive dividends,[76] ability to be pledged[77] and capacity to appreciate in value[78] — are inherently present in virtually all Mississippi LLC investment schemes just as they are in a typical corporation. The presence of the remaining two factors in a typical LLC membership interest, however, is questionable.

First, unlike a typical corporation, a Mississippi LLC interest typically does not confer voting rights in proportion to the number of shares owned. However, by including an express provision in the LLC agreement, an LLC member can vote in proportion to the number of shares owned.[79] Furthermore, unlike a corporation, members are entitled to a single vote on any management matter.[80]

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menting that "label" alone was not conclusive under *Landreth*; rather, "[t]he key inquiry [is] related to the *actual characteristics* of the stock in question") (emphasis in original). The converse is also true — instruments labeled "stock" are not automatically within the scope of the Federal Act. *Landreth*, 471 U.S. at 686.

[76] The Mississippi LLC Act specifically authorizes allocation of profits and losses among the members of the LLC based on an allocation method provided in the certificate of formation, operating agreement, or as a default provision pro-rata based on contribution value. MISS. CODE ANN. § 79-29-503 (Supp. 1994).

[77] Section 79-29-701 of the Mississippi Code provides that an LLC interest is "personal property," and section 79-29-702 provides that "the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the [LLC] interest of the member shall not cause the member to cease to be a member or to cease to have the power to exercise any rights or powers of a member." MISS. CODE ANN. §§ 79-29-701, -702 (Supp. 1994). Thus, interests may be freely used as security for other transactions.

[78] The Mississippi LLC Act does not contain any provisions which generally limit the ability of an LLC interest to appreciate. *See generally* MISS. CODE ANN. §§ 79-29-101 *et seq.* (Supp. 1994).

[79] MISS. CODE ANN. § 79-29-304(1) (Supp. 1994). Section 304(1) states that "[u]nless otherwise provided in the certificate of formation or limited liability company agreement, each member of a limited liability company shall be entitled to one vote on any matter entitled to be voted on by the members." *Id.* In opposition to this premise, the comparable provision of the Mississippi Business Corporation Act states that "[e]xcept as [otherwise] provided . . . or unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one (1) vote on each matter voted on at a shareholders' meeting." MISS. CODE ANN. § 79-4-7.21(a) (1989).

[80] MISS. CODE ANN. § 79-29-304(1) (Supp. 1994). According to section 79-4-7.21(a) of the Mississippi Code, a shareholder's vote is restricted to matters pre-

Second, an LLC interest holder's right to freely transfer, assign or otherwise dispose of his interests is significantly restricted.[81] Although there is not a restriction on the transferability of the right to participate in profits in the LLC context,[82] the negotiability characteristics of an LLC are significantly more limited when compared to the characteristics articulated in *Landreth*.[83]

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sented at shareholders' meetings. MISS. CODE ANN. § 79-4-7.21(a) (1989). For example, in Mississippi, the board of directors may, by default, sell, lease or otherwise dispose of corporate assets in the normal course of business without first obtaining shareholder approval. MISS. CODE ANN. § 79-4-12.01 (1989).

Conversely, the Mississippi LLC Act grants broad voting rights to the members of an LLC, stating that each member "shall be entitled to vote on *any* matter." MISS. CODE ANN. § 79-29-304(1) (Supp. 1994) (emphasis added). Limitations on this broad voting right, however, may be made within the certificate of formation or LLC operating agreement. *Id.* It should be noted, however, that delegation of LLC voting rights may result in the loss of pass-through taxation. *See supra* note 44 and accompanying text.

[81] MISS. CODE ANN. § 79-29-704(1) (Supp. 1994). Section 79-29-704(1) states that an "assignee of a limited liability company interest may become a member if and to the extent that (a) the certificate of formation or limited liability company agreement so provides or (b) all other members consent." *Id.*

On the other hand, the default provisions of the Mississippi Business Corporation Act provide no restrictions on the transferability of the stock of a corporation's shares. MISS. CODE ANN. § 79-4-6.27(a) (1989). Specifically, section 79-4-6.27(a) states that the "articles of incorporation, bylaws, an agreement among shareholders or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation." *Id.*

[82] MISS. CODE ANN. § 79-29-702 (Supp. 1994). Section 79-29-702 provides in pertinent part that although an LLC interest is assignable in whole or in part, an

> assignment of a limited liability company interest does not . . . entitle the assignee to become or to exercise any rights of a member. An assignment entitles the assignee, to the extent assigned, to share in such profits and losses, to receive such distribution or distributions, and to receive such allocations of income, gain, loss, deduction, credit or similar items to which the assignor would have been entitled.

Id.

[83] *See* Steinberg & Conway, *supra* note 21, at 1118 (explaining that LLC restrictions are analogous to statutory restrictions under close corporation acts and therefore these restrictions should "not present a block to defining such interests as securities"). Many states place statutory restrictions on the transferability of close corporations which are similar in nature to the type of restrictions Mississippi places on LLCs. *See, e.g.*, TEX. BUS. CORP. ACT ANN. arts. 12.32(A)(4),

Thus, absent deviation from the default provisions of the Mississippi LLC Act, an LLC investment scheme will exhibit only three of the five traditional stock characteristics delineated in *Landreth*. Consequently, it is likely that a court will find that an LLC interest should not be construed as "stock" under applicable securities laws.[84] Modification of the default provisions in either the LLC's certificate of formation or the LLC agreement, however, could give rise to a finding that an interest in the LLC constitutes "stock" under *Landreth*.

B. Application of the Family Resemblance Test

Alternatively, the "family resemblance" test, as promulgated in the relatively recent United States Supreme Court case of *Reves v. Ernst & Young*,[85] could be applied to determine whether a Mississippi LLC investment falls within the definitional category[86] of "any interest or instrument commonly known as a security."[87] The *Reves* test established a presumption that a particular instrument, for example a promissory note,[88] was a security because the applicable securities laws

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12.36(B), 12.37(D) (West Supp. 1992) (stating that binding restrictions on transferee's rights to participate in business and affairs of close corporation, as well as mode of shareholder action, may be made within shareholders' agreement); MD. CODE ANN., CORPS. & ASS'NS. §§ 4-401(a)(1), (4) (1993) (stating that "unanimous stockholders' agreement . . . may regulate any aspect of the affairs of the corporation or the relations of the stockholders, including . . . management of the business and affairs of the corporation . . . and exercise or division of voting power"). This "sale of business" judicial exclusion from securities laws, repudiated in *Landreth*, was legislatively revived under these state statutes. *Landreth*, 471 U.S. at 694-97. Mississippi, however, does not provide for any statutory restrictions on the transferability of close corporations.

[84] Thus, compliance with security laws should not be necessary for LLCs created under the Mississippi LLC Act without any expressed modification to the respective operating agreement. Hence, transactional costs will be significantly lower as promoters will not have to incur due diligence expenses in compliance with securities regulations. *See supra* note 5 and accompanying text.

[85] 494 U.S. 56, 65 (1990).

[86] *See supra* notes 11-14 and accompanying text.

[87] Steinberg & Conway, *supra* note 21, at 1120-21 (concluding that "the family resemblance test apparently has widespread application, encompassing the determination whether LLC interests are securities").

[88] *Reves*, 494 U.S. at 59. In *Reves*, a farming cooperative issued promissory

enumerated that type of instrument.[89] Accordingly, the issuer may rebut this presumption by showing that "the [instrument] bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument."[90] Commentators have suggested that the "family resemblance" test can be applied to a wide range of alleged "securities," not just "notes."[91]

Under the *Reves* analysis, there are four factors to consider when construing whether a particular investment scheme constitutes a security.[92] First, the court should "examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it."[93] Second, the

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notes payable on demand to over 1600 individuals in order to raise capital for general business operations. *Id.* at 58-59. The notes were issued on a multi-state solicitation program which included publicly distributed advertisements. *Id.*

[89] *Id.* at 67. The Federal Act expressly states that the term "security" means "any note." *Id.* at 60; *see supra* notes 11-14 and accompanying text.

[90] *Reves*, 494 U.S. at 67. The Court therefore refused to apply the *Howey* analysis to the issue, stating that

> [t]o hold that a "note" is not a "security" unless it meets a test designed for an entirely different variety of instrument "would make the Acts' enumeration of many types of instruments superfluous" . . . and would be inconsistent with Congress' intent to regulate the entire body of instruments sold as investments.

Id. at 64 (quoting *Landreth*, 471 U.S. at 692).

[91] *See* Carl W. Schneider & Joshua D. Cohen, Reves v. Ernst & Young*: A Note-Worthy Departure in Defining "Security"*, 23 SECURITIES & COMMODITIES REGULATION 191, 201 (Standard & Poor's Corp. Nov. 7, 1990) (stating that "*Reves* approach will probably be followed with respect to 'bonds' and 'debentures,' which are also named classes of security"); Marc I. Steinberg, *Notes as Securities:* Reves *and Its Implications*, 51 OHIO ST. L.J. 675, 679 (1990) (stating that "if any applicable standard has widespread application in the definition of 'security' setting, it is the 'family resemblance' test"); *see also* Meridian Software Funding, Inc. v. Pansophic Sys., Inc., No. 91-C6055, 1992 WL 107310, at *1 (N.D. Ill. May 14, 1992) (analyzing under *Reves* whether letter agreement, involving financing of certain software packages, constitutes security pursuant to federal securities laws); National Bank of Yugoslavia v. Drexel Burnham Lambert, Inc., 768 F. Supp. 1010, 1014-16 (S.D.N.Y. 1991) (construing under *Reves* whether time deposits were securities for federal securities laws purposes); Diaz Vicente v. Obenauer, 736 F. Supp. 679, 692-93 (E.D. Va. 1990) (using *Reves* to determine whether participation agreements, specifically enumerated under Federal Act, when used in commercial real estate venture were securities under Federal securities laws).

[92] *Reves*, 494 U.S. at 66-67.

[93] *Id.* at 66. The Court found the transactions to be "investment[s] in a busi-

"plan of distribution" should be examined "to determine whether it is an instrument in which there is common trading for speculation or investment."[94] Third, courts should "examine the reasonable expectations of the investing public."[95] Finally, consideration should be given to any other risk reducing factors, such as an alternative regulatory system, that would reduce the risk of trading misconduct.[96]

Capital investment or other general business programs involving the exchange of Mississippi LLC interests for investment dollars likely will give rise to a presumption under *Reves* that the membership interests are securities under applicable securities laws.[97] Under this scenario, the LLC promoter would then be faced with the task of rebutting this presumption, utilizing the terms of the four *Reves* factors, to avoid securities laws liability.[98]

Consequently, the four *Reves* factors are further examined in the context of a Mississippi LLC investment scheme. First, the motivation for selling an interest in an LLC ordinarily will be to raise capital or otherwise generate operating funds from

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ness enterprise rather than as a purely commercial or consumer transaction" from both the buyer's and seller's perspectives. *Id.* at 68. The buyer was looking for a favorable interest return on its investment. *Id.* at 67-68. The seller was attempting to raise capital for general business operations. *Id.* at 67.

[94] *Id.* at 66 (quoting SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351, 353 (1943)). Although the notes were not traded on an exchange, the Court found that the "requisite 'common trading'" was established because they were "offered and sold to a broad segment of the public" over an extended period of time. *Id.* at 68.

[95] *Id.* at 66. In finding that the reasonable expectations of the public were that the notes were "investments," the Court relied on the fact that the advertising characterized the notes as "investments" along with the absence of any "countervailing factors." *Id.* at 68-69.

[96] *Id.* at 67. In finding no risk-reducing factors, the Court noted that the notes were neither insured, collateralized nor subject to another regulatory system. *Id.* at 69.

[97] *Reves*, 454 U.S. at 67-68; *see, e.g.*, Chemical Bank v. Arthur Anderson & Co., 726 F.2d 930, 939 (2d Cir. 1984) (applying test to promissory notes issued in capital restructuring deal); Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126, 1137 (2d Cir. 1976) (applying test to purchase of unsecured subordinated notes from brokerage firm).

[98] *See supra* notes 85-96 and accompanying text.

the perspective of a promoter.[99] A buyer likely will be motivated by this same investment purpose — to earn a return on his investment. Thus, the typical LLC offering transaction, in the words of the *Reves* Court, "is most naturally conceived as an investment in a business enterprise rather than as a purely commercial or consumer transaction" and, thus, establishes the first *Reves* factor.[100]

Second, the plan of distribution factor will likely be established when the LLC interests are offered and sold to a broad segment of the public.[101] According to *Reves*, the fact that LLC interests usually are not traded on an exchange and the fact that the secondary market for these interests is rather weak, if not totally nonexistent, will not be dispositive with respect to this factor.[102]

Third, the public's expectation requirement likely is dependant on the characterization of the LLC in any advertisements or other sales literature. For example, the use of a prospectus or simply presenting potential investors with financial reports, without expressly qualifying the LLC materials, may be sufficient to establish the third factor because of the public expectation that similar materials are governed by securities laws.[103]

Finally, the fourth factor probably poses the least interpretative difficulty. This factor is easily satisfied in the LLC context due to the absence of an independent insurer or regulatory system to reduce the risk of fraud or other misconduct.

In summary, the *Reves* approach could result in a Mississippi LLC being classified as "any interest or instrument com-

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[99] *See* Steinberg & Conway, *supra* note 21, at 1121.

[100] *Reves*, 494 U.S. at 68.

[101] *Id.* The Court noted that the Co-op in *Reves* offered the notes to more than 23,000 people in more than one state and that 1600 people ultimately held notes when the Co-op filed for bankruptcy. *Id.* at 58-59.

[102] *Id.* at 68; *see* Steinberg & Conway, *supra* note 21, at 1121 (concluding that "this factor should be deemed satisfied" if interests are merely "capable of mass distribution or public trading").

[103] *Landreth*, 471 U.S. at 693; *see also* United Hous. Found. v. Forman, 421 U.S. 837, 851 (1975) (applying approach which inquires whether acquiring party would realistically expect investment protection under applicable securities laws).

monly known as a security."[104] Under typical LLC investment schemes, the *Reves* factors will not provide a sufficient basis to rebut this presumption, should a court opt to apply the "family resemblance" test. It remains to be seen, however, to what degree the courts are willing to utilize the "family resemblance" test beyond its initial application to "notes" in *Reves*.

VI. CONCLUSION

The regulatory flexibility of LLC governance available under the Mississippi LLC Act makes the development of a single hard and fast rule regarding the application of securities laws to Mississippi LLCs virtually impossible. Within each situation, the particular certificate of formation and LLC agreement terms are crucial to the final determination of whether securities laws are applicable. Consequently, the theoretical answer to the question posed by this Comment is "maybe," depending on the governance terms established in the certificate of formation and the LLC agreement.

A few practical conclusions, however, may be reached. Barring any future definitive judicial action or promulgation by the Mississippi Legislature or Secretary of State, the careful practitioner should, in similar fashion to the logic adopted by the *Reves* Court,[105] initially presume that a proposed LLC is a security. Thereafter, the promoter of the LLC can probably rebut this presumption when all of the following conditions are present. First, either (1) both the certificate of formation and the LLC agreement do not alter any of the default provisions of the Mississippi LLC Act, or (2) the LLC deviates from the default provisions by utilizing centralized management but, importantly, vests ultimate power in all the members to create and dissolve the management group. Second, the majority of the members are not completely inexperienced or unknowledgable about the industry in which the respective LLC is to operate. Finally, the LLC interests are not offered or

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[104] *See supra* note 87 and accompanying text.

[105] *See supra* notes 92-104 and accompanying text.

sold on a mass-marketing basis, nor are capable of common trading for speculation or investment. In all other scenarios, careful consideration should be given to *Howey*, *Marine Bank*, *Landreth* and *Reves* prior to the commencement of any transactions involving Mississippi LLCs.

Jeffrey A. Mannisto

WHY MISSISSIPPI SHOULD GIVE ADOPTED CHILDREN THE SAME INTESTATE SUCCESSION RIGHTS WHICH NATURAL-BORN CHILDREN ENJOY

Under Mississippi law, adopted children are not given the same rights of inheritance as natural-born children.[1] Although permitted to inherit[2] from adoptive parents, siblings, lineal ancestors, and the siblings of such ancestors, adopted children are not allowed to inherit, in any degree of kinship,[3] from their adoptive cousins, nieces, or nephews, as are natural-born children.[4] According to the Mississippi Code:

> [A]n adopted child is vested with all of the rights, powers, duties and obligations . . . as if such child had been born to the adopting parents in lawful wedlock . . . *provided, however*, that inheritance by or from the adopted child shall be governed by subsection (a) above. . . .[5]

Subsection (a) provides:

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[1] *See* ROBERT A. WEEMS, WILLS AND ADMINISTRATION OF ESTATES IN MISSISSIPPI § 1-9, at 12 (1988) ("The inheritance rights of an adopted child to inherit from the kindred of the adoptive family are clearly not as broad as those of a natural child of the adoptive parents.").

[2] The word "inherit" has recently come to encompass the concept of acquisition of property through a will. However, as used in this comment, the terms "inherit" and "inheritance" denote only the acquisition of property in accordance with the laws of intestate succession. *See* BLACK'S LAW DICTIONARY 782-83 (6th ed. 1990). Adopted children may receive by a will just as anyone else. However, for a discussion of how the United States Supreme Court construed a letter, probated as a will in Mississippi, to prevent Alabama property from passing to children adopted in another state, see *infra* notes 43-46 and accompanying text.

[3] A copy of the Nolan Chart, which shows relatives by degrees of kinship—all of whom natural-born children are permitted to inherit from and most of whom adopted children are not allowed to inherit from—can be found at Owen v. State, 51 So. 2d 541, 542 (Miss. 1951).

[4] *See* MISS. CODE ANN. § 93-17-13 (1994).

[5] *Id.* § 93-17-13 para. 2(b) (1994) (emphasis added).

> [T]he [adopted] child shall inherit from and through the adopting parents and shall likewise inherit from the other children of the adopting parents to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of descent and distribution of the State of Mississippi. . . .[6]

This is the only right of intestate succession provided for adopted children by Mississippi statute. Since adoption is statutory, the only rights of inheritance enjoyed by adopted children are those specifically granted by statute.[7] The phrase "through the adoptive parents" has been interpreted to refer to the right of representation.[8] The right of representation allows the children of a deceased parent to share equally in what their parent would have taken by intestate succession if the parent had remained alive.[9] In Mississippi, however, representation is limited to the lineal descendants of the intestate and the lineal descendants of siblings of the intestate.[10] In other words, the only collateral relatives a child can inherit from by representa-

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[6] *Id.* § 93-17-13 para. 2(a). Professor Weems of the University of Mississippi School of Law argues that the Mississippi Legislature intended to restrict the succession rights of adopted children. *See* ROBERT A. WEEMS, MISSISSIPPI WILLS AND ESTATES: CASES, STATUTES, AND MATERIALS § 1-3, at 21 n.1a (2d ed. 1990) [hereinafter MISSISSIPPI WILLS]. Professor Weems points to the absence of language in the adoption statute allowing adopted children the right to inherit from adoptive kindred and the presence of language in the same section identifying non-inheritance rights between adopted children and their adoptive kindred. *Id. Compare* § 93-17-13 para. 2(a) *with* § 93-17-13 para. 2(b).

[7] *See* Reeves v. Lowe, 56 So. 2d 475, 478 (Miss. 1952); WEEMS, WILLS AND ADMINISTRATION OF ESTATES, *supra* note 1, § 1-9, at 11; *see also* 2 C.J.S. *Adoption of Persons* § 146, at 578 n.38 (1972 & Supp. 1994) (listing states which have ruled that only right of intestate succession enjoyed by adopted persons is what is specifically provided for by statute).

[8] *See* WEEMS, MISSISSIPPI WILLS, *supra* note 6, § 1-3, at 21 n.1; Brenda B. Bethany & John A. Bethany, III, Project, *Supreme Court Review—Miscellaneous*, 50 MISS. L.J. 833, 860-61 (1979). *But see* James Robertshaw, *Mississippi's New Adoption Law*, 27 MISS. L.J. 32, 36, 39-40 (1955) (arguing that, depending on how phrase is interpreted, "through the adopting parents" may have broader meaning which endows adopted person with collateral kin inheritance rights approximating natural-born person's rights).

[9] *See* MISS. CODE ANN. §§ 91-1-3, -11 (1994).

[10] *See id.* § 91-1-3.

tion are aunts and uncles and great-aunts and great-uncles, etc. Therefore, if representation is what the statute refers to, Mississippi only gives adopted children the right to inherit from some of their adoptive parents' relatives.[11] By contrast, natural-born children have the potential of inheriting, not just from siblings and from and through their parents, but from any person with whom they share a common blood-ancestor.[12]

The old rule in Mississippi was that adopted children had no right of inheritance from any of the adoptive family except the adoptive parents, and that right existed only when the adoption decree specifically conferred it.[13] For example, in 1954 the Mississippi Supreme Court ruled that an adopted child would not be allowed to inherit from her adoptive brother despite language in the adoption decree stating that the adopted child should have all the rights of a child born to the adoptive parents.[14] The court reasoned that "[a]lthough by adoption the adopters can make for themselves an heir, they can not thus make one for their kindred."[15] In another case the court held that an adopted child could not inherit from her aunt by

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[11] According to James Robertshaw, one of the lawmakers present when the Legislature passed the adoption law of 1955, those supporting the inclusion of the statutory language limiting adoptees' inheritance rights according to § 93-17-13 para. 2(a) sought to prohibit adopted children from inheriting from any of the adopting parents' collateral kin. Robertshaw, *supra* note 8, at 36. Robertshaw found it questionable whether the statute actually accomplished that goal. *Id.*

[12] *See* MISS. CODE ANN. § 91-1-3 (1994). *See generally* WEEMS, MISSISSIPPI WILLS, *supra* note 6, § 1-3, at 6-12 (categorizing all possible inheritors into four successive groups which mirror statutory provisions).

[13] *See* Welch v. Funchess, 71 So. 2d 783, 784-85 (Miss. 1954); Reeves v. Lowe, 56 So. 2d 475, 479 (Miss. 1952); Fisher v. Browning, 66 So. 132, 134 (Miss. 1914); Leonard v. H. Weston Lumber Co., 65 So. 459, 460 (Miss. 1914); Beaver v. Crump, 23 So. 432, 433 (Miss. 1898); Robertshaw, *supra* note 8, at 36.

[14] *Welch*, 71 So. 2d at 784.

[15] *Id. But cf.* Jan E. Rein, *Relatives by Blood, Adoption and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 721 (1984) (contending that such arguments "ignore the fact that a child's birth always imposes a potential heir on the relatives of his biological parents, yet no one would suggest that the child should not inherit from his blood relatives because they had not consented to his conception"); Robertshaw, *supra* note 8, at 36 n.18 (arguing that such reasoning is "absurd" unless "collateral relatives should [also] be parties to the proceedings whereby natural children are obtained").

representing her deceased mother.[16] When those cases were decided, the adoption statute said nothing of inheritance rights for adopted children.[17]

In 1955, the Legislature repealed the then existing adoption statute and provided in new legislation that adopted children would automatically inherit from some collateral adoptive kin.[18] However, in a 1959 case, the Mississippi Supreme Court denied a woman an inheritance from her aunt because the woman had been adopted in 1922 (under the old statute) and had not been re-adopted under the new 1955 statute.[19]

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[16] *Reeves*, 56 So. 2d at 479-80.

[17] *Id.* at 476; *Welch*, 71 So. 2d at 784. Similarly, under the old rule, adoptive parents were not permitted to inherit from their adopted children. Instead, the adoptee's property would go to the natural parents (assuming the adopted child had no spouse or children of her own). *See* Robertshaw, *supra* note 8, at 32. Under the old rule, Robertshaw stated, the following scenario might arise:

> John and Mary Jones adopt Jack, conferring upon him [through the adoption decree] the right of inheritance. John dies intestate, leaving his home and his life's accumulation of property equally to Mary and Jack, a minor. Jack, being a minor, cannot convey the property to another, and cannot execute a will. Jack dies before majority. His natural kindred, not Mary, inherit. Thus, Mary finds herself a joint owner, with perfect strangers, of her (she thought) own home and all the property she and John had accumulated through their joint efforts.

Id.

[18] *See* Act of Mar. 3, 1955, ch. 34, 1955 Miss. Laws 117, 121, 124 (extraordinary session).

[19] Gray v. Morgan, 110 So. 2d 346, 348-49 (Miss. 1959). The court reasoned that re-adoption after July 1, 1955 was the only means for an adopted individual to acquire the inheritance benefits of the new law despite the fact that the adoptive parents of the plaintiff in the instant case had died prior to the enactment of the 1955 adoption statute. *Id.* at 347-49.

Commentators continue to cite *Gray* for the proposition that individuals adopted prior to the 1955 adoption law cannot benefit from its increased inheritance rights provision unless they were re-adopted after the law's effective date (July 1, 1955). *See* WEEMS, WILLS AND ADMINISTRATION OF ESTATES, *supra* note 1, § 1-9, at 12, 13 n.7. However, the *Gray* court based its decision on only two sections of the adoption law, neither of which are in the current code. *Compare* MISS. CODE ANN. §§ 1269-10, 1269-12 (1942) *with* MISS. CODE ANN. §§ 93-17-1 to -31 (1994). Inasmuch as the 1972 code superseded the 1942 code (along with the sections relied upon by the *Gray* court), *see* Act of Apr. 26, 1972, ch. 394, 1972 Miss. Laws 446, the holding in *Gray* is arguably no longer valid. Mississippi courts might reasonably construe the omission of those sections in the 1972 Code as legislative intent for the benefits of the 1955 adoption law to apply to all

This case illustrates the narrow construction the court has given to the adoption statute and the continuing judicial preference of granting inheritance according to the bloodline. The court's reasoning prior to the 1955 adoption statute—that people should not be allowed to make for others heirs through adoption—apparently continues to control, limited only by the specific inheritance rights mentioned in the statute. Many commentators have suggested that such a continuing preference for consanguinity is outdated and destructive to the purposes of the adoptive process, that being to fully assimilate the adopted child into the adopting family.[20]

Assuming that the purpose of intestacy statutes is to carry out the presumed wishes of a typical decedent as to the distribution of his property,[21] the question arises whether the typical Mississippi decedent would indeed want to exclude the adopted children of his relatives from having a portion of his estate. If the answer is no, then Mississippi's law should be changed.[22]

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adoptees, regardless of when they were adopted. *See* MISS. CODE ANN. §§ 93-17-1 to -31 (1972).

There is no provision in Mississippi law for re-adoptions by proxy. Therefore, attacking the validity of *Gray* may be the only way persons adopted prior to July 1, 1955, whose parents have died, may inherit from their adoptive siblings or from any of the collateral kin of their adoptive parents.

[20] *See, e.g.*, Lisa A. Fuller, Note, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception be Extended?*, 77 CORNELL L. REV. 1188, 1202 (1992) ("[I]ntestacy statutes, which define a decedent's intended heirs by blood relationships, appear at odds with adoption statutes, which are designed to promote [the best interests of the adopted child] by severing all ties with blood relatives."); *see also* Anne W. French, Note, *When Blood Isn't Thicker Than Water: The Inheritance Rights of Adopted-Out Children in New York*, 53 BROOK. L. REV. 1007, 1041 (1988) (arguing that allowing adoptees to inherit from non-custodial natural parents can be harmful to adoptee); Timothy Hughes, Comment, *Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child be Determined By Blood or By Law?*, 1988 WIS. L. REV. 321, 340, 351 (same).

[21] *See* Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 323-24; *see also* MAX RHEINSTEIN & MARY A. GLENDON, THE LAW OF DECEDENTS' ESTATES 24 (1971) ("[T]he legislative will ought to coincide so far as possible with the probable wishes of the majority of people who die intestate.").

[22] Although Mississippi intestate law does treat adopted children differently than their adoptive brothers and sisters, at least one other state restricts the

If the Mississippi Legislature wants to give adopted children the same rights of intestate succession as natural-born children, it should amend section 93-17-13 paragraph 2 accordingly. Perhaps the most straightforward approach to the issue is found in South Dakota's law which has the following provision in its adoption statute:

> Any adopted child has the same right to inherit by intestate succession from any person related to the adoptive parent, in any degree of kindred, as if the adopted child were the natural child of the adoptive parent.[23]

Nevada also utilizes direct language to address the situation:

> Upon the entry of an order of adoption, the child shall become the legal child of the persons adopting him, and they shall become his legal parents with all the rights and duties between them of natural parents and legitimate child. By virtue of such adoption he shall inherit from his adoptive parents or their relatives the same as though he were the legitimate child of such parents, and in case of his death intestate the adoptive parents and their relatives shall inherit his estate as if they had been his natural parents and relatives in fact.[24]

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inheritance rights of adopted persons to an even greater degree. Vermont prohibits adoptees from taking an inheritance from any of the adoptive parents' collateral relatives. *See* VT. STAT. ANN. tit. 15, § 448 (1989).

Unlike many states, Mississippi does allow adopted children to inherit from their biological kindred. *See* Warren v. Foster, 450 So. 2d 786, 788 (Miss. 1984); Alack v. Phelps, 230 So. 2d 789, 793 (Miss. 1970); Sledge v. Floyd, 104 So. 163, 165 (Miss. 1925). However, this possible source of inheritance, although not available to adoptive siblings, should not be a consideration in determining whether adopted children should enjoy the same intestate succession rights as natural-born children. This benefit is severely restricted by Mississippi's continued unwillingness to release information to adopted children concerning their biological parents. *See* MISS. CODE ANN. § 93-17-25 (1994); "Mississippi Adoption Confidentiality Act", MISS. CODE ANN. §§ 93-17-201 to -223 (1994). Admittedly, this is not a problem in adoption situations where the identity of the natural parent is known to the child. This would often be the case in a step-parent adoption subsequent to a divorce of the child's natural parents. For an argument that allowing adoptees to inherit from the natural bloodline impedes assimilation into the adoptive family, see Hughes, *supra* note 20, at 336.

[23] S.D. CODIFIED LAWS ANN. § 29-1-5.1 (Supp. 1994).

[24] NEV. REV. STAT. ANN. § 127.160 (Michie 1993).

Despite Mississippi's statutory language limiting adoptees' inheritance rights, the Mississippi Supreme Court, in *Dodds v. Deposit Guaranty National Bank*,[25] appeared to hold that adoptees enjoy the same inheritance rights as natural-born children. In 1975 Bettye Dodds executed a will establishing a trust for the benefit of her only child Edwin (a then married son whom Mrs. Dodds had adopted in 1942) and for Edwin's children upon his death.[26] Subsequent to the execution of this will, Edwin remarried and adopted his second wife's son from her previous marriage.[27] After Mrs. Dodd's death, a petition was filed which, in part, asked for a judicial construction of the trust.[28] The question was whether upon Edwin's death, his adopted son would be allowed to share in the trust along with Edwin's two biological daughters from his previous marriage.[29] The Mississippi Supreme Court approved the lower court's ruling that Edwin's adopted child would share equally with the natural-born children.[30] In so doing, the court rejected the argument that Edwin's adopted son was an unaccounted unintended collateral kin to Mrs. Dodds under Mississippi's adoption statute and thus prevented from having a share in the trust.[31]

After reviewing Mississippi's adoption statute as it relates to inheritance rights,[32] the court posed the question of whether the Legislature intended for natural-born children to have different inheritance rights than adopted children.[33] The court found no such intent.[34] The court led up to this conclusion by favorably quoting rulings from other jurisdictions which make no distinction between the intestate rights of adopted and natu-

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[25] 371 So. 2d 878 (Miss. 1979).
[26] *Dodds*, 371 So. 2d at 879.
[27] *Id.*
[28] *Id.* at 880.
[29] *Id.* at 879-80.
[30] *Id.* at 882.
[31] *Dodds*, 371 So. 2d at 880-82.
[32] MISS. CODE ANN. § 93-17-13 (1994).
[33] *Dodds*, 371 So. 2d at 881.
[34] *Id.*

ral-born children.[35] According to the court, this was done in order to express the court's own thoughts on Mississippi's adoption statute.[36]

However, the court seemed to retreat from its position that the Mississippi Legislature had not intended to differentiate between adopted and natural-born children when it further stated that "the legislature intended to elevate an adopted child to the same status in law as a natural child for inheritance *from the adopting parents and their children.*"[37] It is not clear whether the court was limiting the comprehensive statement it had just made or was simply applying the statement to the particular facts of the case at bar.[38] If this issue was tried again, but the adoptive intestate kindred was a cousin, a niece, or a nephew, perhaps the court's expansive language elevating adopted children to the same status as natural-born children for purposes of inheritance would be considered only dicta since it went beyond the need to address the specific question before the court—inheritance from an adoptive grandparent.[39]

Given the history of Mississippi Supreme Court rulings on

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[35] *Id.* at 880. The court "embrace[d] the language" of a Georgia Supreme Court decision which interpreted that state's adoption statute as "'placing an adopted child upon the same level as that of a natural-born child of lawful birth, *in all respects*. . . .'" *Id.* (quoting Thornton v. Anderson, 64 S.E.2d 186, 189 (Ga. 1951)) (emphasis added). The court further quoted with approval a Pennsylvania Supreme Court ruling which held that an adopted child "'attains the status, in law, of a natural child of the adopting parents.'" *Dodds*, 371 So. 2d at 880 (quoting In re Schwab's Adoption, 50 A.2d 504, 505 (Pa. 1947)).

[36] *Dodds*, 371 So. 2d at 880. One Mississippi Supreme Court justice declared in a later case that "[t]he fundamental effect of our adoption inheritance statute, is that it places adopted children in the same legal relationship vis à vis the adopting parents *and, indeed, the remainder of the adoptive family*, as though the children had been naturally born into that family." Posey v. Webb, 528 So. 2d 833, 837 (Miss. 1988) (Robertson, J., concurring) (emphasis added) (citation omitted).

[37] *Dodds*, 371 So. 2d at 881 (emphasis added).

[38] If the court were limiting its holding to simply the facts of the instant case, including the phrase "and their children" would not have been necessary.

[39] *See* J. W. BUNKLEY, JR. & W. E. MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI § 12.16, at 57 n.18 (Supp. 1980) (stating that *Dodds* did not address issue of adoptees inheriting from adoptive collateral kin).

this issue,[40] and particularly the apparent ambivalence of the court in the *Dodds* case, the only sure way to give adopted children the same rights as natural-born children is for the Legislature to amend the adoption statute. Recently the Mississippi Legislature had just that opportunity, but failed to enact the proposed Mississippi Uniform Probate Code. One of its provisions would have elevated adopted children to the same level of natural-born children for all intestate succession situations.[41] The Legislature could of course enact just this provision without adopting the entire Uniform Probate Code.

Historically, other states, as well as the federal government, have also been reluctant to extend full rights of inheritance to adopted children.[42] For example, in a 1915 case, the United States Supreme Court ruled that adopted children could not inherit land from their parent by intestate succession if the state where the land was situated denied such inheritance rights to adopted children.[43] In that case a man had adopted two children in Louisiana, with the adoption decree "invest[ing] them with all the rights and benefits of legitimate children. . . ."[44] However, the Alabama Supreme Court denied the adopted children their father's Alabama land.[45] The United States Supreme Court upheld the Alabama Supreme Court decision despite a full faith and credit claim.[46]

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[40] *See* Robertshaw, *supra* note 8, at 37 (arguing that Mississippi courts "have been diligently astute to restrict and narrow the rights of adopted children") (footnote omitted).

[41] *See infra* note 58; H.B. 921, Reg. Sess. § 2-114(d) (Mississippi Uniform Probate Code); Robert A. Weems & Katherine L. Evans, *Mississippi Law of Intestate Succession, Wills, and Administration and the Proposed Mississippi Uniform Probate Code: A Comparative Analysis*, 62 MISS. L.J. 1, 12 (1992).

[42] *See* Fred L. Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U. L.Q. 221, 224-34 (1943); W. W. Allen, Annotation, *Right of Adopted Child to Inherit from Kindred of Adopted Parent*, 43 A.L.R.2d 1183 (1955).

[43] Hood v. McGehee, 237 U.S. 611, 615 (1915).

[44] *Hood*, 237 U.S. at 614.

[45] *Id.* at 615.

[46] *Id.* at 614. A letter to the children stated that "everything else of mine is to be yours equally divided." *Id.* The letter was probated as a will in Mississippi, but the Court said it was "relied upon only as confirming the intent supposed to

However, modern Supreme Court jurisprudence may indicate that a state violates the Equal Protection Clause of the Fourteenth Amendment by applying its intestate laws differently to adopted persons. The Court now requires that a challenged state law which classifies groups for different treatment at least "bear some rational relationship to a legitimate state purpose."[47] Normally this requirement has not been much of a hurdle for state legislation, since the Court has generally found almost any state interest to be legitimate and any reasonable means to be rationally related to that interest.[48] Nonetheless, in the case of *Trimble v. Gordon*,[49] the United States Supreme Court applied this rational relationship test[50] in holding un-

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be expressed by the instrument of adoption. . . ." *Id.* In other words, as to the adopted children, the Court construed the language of the will as conferring no additional right beyond what Louisiana's intestate succession law provided. *Id.* Since Louisiana had no authority to proscribe the descent of Alabama land by intestate succession, the Court upheld Alabama's rule denying descent of its land to adopted children. *Id.* at 614-15. The Court indicated that the father's "mistaken expectation" that his adopted children would inherit the Alabama land was insufficient to make it so. *Id.* at 615.

[47] Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 172 (1972); *accord* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). A stricter scrutiny, requiring that discriminatory legislation "advance a compelling state interest by the least restrictive means available," is applied if the group affected is a suspect class. Bernal v. Fainter, 467 U.S. 216, 219 (1984) (footnote omitted). *See generally* Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12-48 (1972) (articulating various levels of scrutiny Supreme Court utilizes in equal protection cases).

Federal courts have consistently declined to extend suspect class status to adopted individuals. *See, e.g.*, Tsosie v. Califono, 630 F.2d 1328, 1337 (9th Cir. 1980) (upholding Social Security Act's denial of secondary insurance benefits to dependent unrelated after-adopted children), *cert. denied sub nom.*, Tsosie v. Schweiker, 451 U.S. 940 (1981); Clayborne v. Califano, 603 F.2d 372, 378 (2d Cir. 1979) (same); Williams v. Matthews, 441 F. Supp. 1045, 1046 (E.D. La. 1977) (same), *aff'd sub nom.*, Williams v. Califano, 566 F.2d 1044 (5th Cir.), *cert. denied*, 439 U.S. 821 (1978).

[48] *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.3, at 22-23 (2d ed. 1992).

[49] 430 U.S. 762 (1977).

[50] *Trimble*, 430 U.S. at 766. There has been some disagreement as to whether the *Trimble* Court applied rational basis scrutiny or something more exacting. *Compare* Harris v. McRae, 448 U.S. 297, 342 n.3 (1980) (Marshall, J., dissenting)

constitutional an Illinois statute which treated illegitimates differently by only allowing them to inherit from their maternal relatives, while legitimate children were permitted to inherit from both maternal and paternal relatives.[51]

Although the *Trimble* Court recognized that, even in the face of a constitutional challenge, "substantial deference" should be given to a state's intestate succession laws,[52] it still held that such legislation could be written in a way as to deny equal protection guarantees.[53] Central to the Court's reasoning was the Illinois Supreme Court's finding that a motivating purpose for the state's statute was to improve the condition of illegitimates and that arguments justifying remaining discrimination had to be viewed against that backdrop.[54] As a result, the Court refused to address Illinois' argument that its statute could not be declared unconstitutional since it represented the

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(citing *Trimble* as adopting intermediate scrutiny for state laws burdening illegitimates) *and Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1564 n.65 (1989) (same) *with* 3 ROTUNDA, *supra* note 48, § 18.16, at 252 (maintaining *Trimble* Court held state act unconstitutional on rational basis grounds) *and* Paula A. Monopoli, *Allocating the Costs of Parental Free Exercise: Striking a New Balance Between Sincere Religious Belief and a Child's Right to Medical Treatment*, 18 PEPP. L. REV. 319, 348 n.189 (1991) (referring to scrutiny applied in *Trimble* as "a rational relation test 'with teeth'") (alluding to metaphor coined in Mathews v. Lucas, 427 U.S. 495, 510 (1976)). Perhaps the Court's posture in *Trimble* is best understood as a robust approach to rational basis scrutiny, which allows for a spectrum of intensity of application. *See* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise,*, 64 TEMP. L.Q. 937, 942 n.38 (1991).

[51] *Trimble*, 430 U.S. at 763. While recognizing states have a valid interest in regulating the disposition of their decedents' property, the Court had previously held that laws dealing with this area were not immune from judicial scrutiny under the Equal Protection Clause. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

[52] *Trimble*, 430 U.S. at 771.

[53] *Id.* The Court emphasized that "'imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.'" *Id.* at 769-70 (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972)). Just as a child does not choose to be illegitimate, neither do most children decide to be adopted. *See* Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) ("Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.").

[54] *Trimble*, 430 U.S. at 768.

"presumed intentions" of the state's citizens.[55]

Similarly, the Mississippi Supreme Court has declared that the "paramount purpose" of adoption laws is the "promotion of the welfare of children."[56] This finding could prove significant if Mississippi's adoption statute were challenged. It might foreclose the possibility of arguing that inheritance aspects of the statute represent the presumed intent of Mississippians and therefore justify discrimination of adopted individuals.[57]

Currently many states give adopted persons the same inheritance rights as natural-born children.[58] Commentators

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[55] *Id.* at 774. The Court did not reach a conclusion concerning whether carrying out presumed intent would insulate a state from an equal protection challenge. *Id.* at 774-75. However, the Court did say that it doubted the carrying out of presumed intent would make a discriminatory law constitutional where the burdened group had been "a frequent target of discrimination." *Id.* at 775 n.16; *see* Eskra v. Morton, 524 F.2d 9, 14 (7th Cir. 1975). Mississippi has traditionally discriminated against adopted individuals. *See supra* notes 13, 16, 19 and accompanying text. Therefore, they are arguably entitled to as much protection in this respect as are illegitimates.

Illinois also argued that since its statute did not present an "insurmountable barrier" to illegitimates receiving paternal estates, (they could still take under a will, or could have been legitimized prior to the father's death), then the statute could not violate the Equal Protection Clause. *Trimble*, 430 U.S. at 773. The Court rejected that argument. *See id.* at 773-74.

[56] Brunt v. Watkins, 101 So. 2d 852, 856 (Miss. 1958).

[57] Even if the statute could be defended on presumed intent grounds, it is debatable whether the intestate wishes of Mississippians toward adopted persons are the same in 1994 as they were in 1955. One Supreme Court Justice opined that *Trimble* was a "derelict" which offered "little precedent for constitutional analysis of State intestate succession laws." Lalli v. Lalli, 439 U.S. 259, 277 (1978) (Blackmun, J., concurring). No other Justice joined in that opinion. *See Lalli*, 439 U.S. at 276 (Blackmun, J., concurring).

[58] Fifteen states (Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah) have incorporated the Uniform Probate Code into their statutory law which, for purposes of intestate succession, treats adopted persons as biological children of the adoptive parents. *See* UNIFORM PROBATE CODE, 8 U.L.A. 1 (Supp. 1994) (listing date of enactment of Uniform Probate Code in each state which has adopted it); Weems & Evans, *supra* note 41, at 5-6. The pertinent part of the Uniform Probate Code reads:

> [F]or purposes of intestate succession by, through, or from a person, an . . . adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the rela-

disagree as to whether there is a trend to extend such rights.[59] Some states have been particularly protective of adopted children's inheritance rights. In an extreme case, a Florida appeals court allowed the adopted son of an intestate's deceased niece to inherit a portion of the intestate's estate despite the fact that the niece's husband had remarried after the niece died, and the second wife had adopted the niece's son prior to the intestate's death.[60] By contrast, a New York court held that a girl who was adopted for a second time lost all rights of inheritance from the first adoption.[61] Neither Mississippi statutes nor case law have addressed the issue of second adoptions and what intestate succession rights, if any, are preserved from the first adoption.[62]

There are, of course, various types of adoptions. Probably the most common is the stepparent adoption, where one of the natural parents of a child remarries, and the new spouse adopts the child.[63] In Mississippi, a child involved in this type of adoption retains all rights of inheritance through the kindred of the natural parents (both the custodial and non-custodial parent), as well as limited rights of inheritance through the new adoptive stepparent.[64]

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tionship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

§ 2-114 (Supp. 1994) (previously § 2-109); *see also* LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL 54 (3d ed. 1993) (describing Uniform Probate Code as treating adopted persons as children of their adoptive parents for all intestate succession situations).

[59] *Compare* Barbara C. Quissell, Note, *Adoption—Intestate Succession—The Denial of a Stepparent Adoptee's Right to Inherit From an Intestate Natural Grandparent:* In re Estate of Holt, 13 N.M. L. REV. 221, 229 n.50 (1983) (asserting that 25 states give full inheritance rights to adopted persons) *with* Rein, *supra* note 15, at 720 n.36 (arguing that such listing is not possible given gaps and exceptions in most state statutes).

[60] In re Estate of Kanevsky, 506 So. 2d 1101, 1102 (Fla. Dist. Ct. App. 1987).

[61] Estate of D'Angelo, 526 N.Y.S.2d 729, 733 (N.Y. Sur. Ct. 1988).

[62] At least one federal court has ruled that, unless a state's statute provides otherwise, someone adopted more than once retains all inheritance rights from previous adoptions. In re Penfield's Estate, 81 F. Supp. 622, 623 (D.D.C. 1949).

[63] *See* Fuller, *supra* note 20, at 1210 n.164.

[64] *See* Alack v. Phelps, 230 So. 2d 789, 793 (Miss. 1970).; MISS. CODE ANN. §

Another adoption situation is where an adult is adopted. Mississippi, which permits a wide range of adoption possibilities allows for this.[65] Concern over adult adoptions may be partly responsible for the Legislature's limiting of an adopted person's inheritance rights. The Legislature may have tried to avoid situations like the one which recently occurred in Louisiana, where a man adopted his wife in order to prevent his son from taking an exclusive share of an estate.[66] The answer to this concern is not to abrogate the rights of all adopted persons, but rather to limit the scope of possible adoptions.[67]

CONCLUSION

Given how infrequently adoptees' intestate succession rights have come before the Mississippi Supreme Court, one might conclude that Mississippi's unequal treatment of adopted children is really not a problem worth remedying. After all, how many adopted persons are actually denied portions of inheritances that they would have received if they were natural-born children of their adoptive parents? There is no way of knowing the answer for sure, but even if this unequal treatment affects only one adopted person, there is sufficient justification for amending the law.[68]

93-17-13 para. 2(a) (1994).

[65] *See* MISS. CODE ANN. § 93-17-3 (1994).

[66] *See* Guttuso v. Plummer, 577 So. 2d 751 (La. Ct. App. 1991). The court declared the adoption "null and void" since it would have created a prohibited marriage. *Guttuso*, 577 So. 2d at 753-54.

[67] One commentator has recommended treating adult adoptees differently than child adoptees for purposes of inheritance from the adoptive parents' relatives. Hallie E. Still-Caris, Note, *Legislative Reform: Redefining the Parent-Child Relationship in Cases of Adoption*, 71 IOWA L. REV. 265, 271-74 (1985).

[68] As long as adopted persons have limited inheritance rights there remains an incentive for them to enter into legal disputes with other family members over the estates of their adoptive kindred who die intestate. As one Mississippi jurist has said: "Family lawsuits usually engender strong animosities and sometimes hatred to a greater degree than that which exists between litigants who are strangers. These unpleasantries outlast the litigation and result in estrangements lasting a lifetime or more." Robert G. Gillespie, Family Lawsuits, *in* PROCEEDINGS OF THE 1963 EIGHTEENTH ANNUAL MISSISSIPPI LAW INSTITUTE ON PROBATE LAW AND PRACTICE 219, 220-21 (1963).

Mississippi has made significant strides in correcting some of the most blatant inheritance inequalities that adopted individuals faced in the past.[69] However, Mississippi has yet to take the important step of allowing adoptees to inherit from all the collateral kin of their adoptive parents so that the adopted individual might be fully assimilated into the adoptive family. Many of Mississippi's Supreme Court justices have seemed to suggest that adopted individuals should have the same rights of inheritance that natural-born children have.[70] In light of *Trimble*, courts may one day soon declare that Mississippi's treatment of adoptees denies them equal protection of the laws, but the Legislature should not wait until that time to act.

If Mississippians do not want their property to pass to the adopted children of their relatives, they may execute a will which accomplishes a distribution to whomever they desire. It is inappropriate for the Legislature to presume that those who die intestate do not want their property descending outside the bloodline. This assumption can only function as governmental approval of the stigmatization of adopted persons. This approval is inconsistent with the stated goal of adoption statutes—to insure that the best interests of the child are protected.[71]

Rick Pyper

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[69] *See supra* notes 13, 14, 16, 19 and accompanying text.
[70] *See supra* notes 35, 36 and accompanying text.
[71] *See supra* note 56 and accompanying text.

RECENT DECISIONS

EVIDENCE—IMPEACHMENT—EVIDENCE OF SIMILAR PRIOR CONVICTION IS ADMISSIBLE TO IMPEACH DEFENDANT IF THE PROBATIVE VALUE OF EVIDENCE OUTWEIGHS THE PREJUDICIAL EFFECT*

Defendant Willie James Bogard appealed his convictions in the Circuit Court of Lafayette County for burglary of an inhabited dwelling while armed with a deadly weapon (Count I), two counts of aggravated assault (Counts II and III) and recidivism.[1] At trial, the facts revealed that Bogard entered an unoccupied house and shot the occupants when they returned home.[2]

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* Best Case Note Award. Presented by the law firm of Ott, Purdy and Scott of Jackson, Mississippi.

[1] Bogard v. State, 624 So. 2d 1313, 1315 (Miss. 1993).

[2] *Bogard*, 624 So. 2d at 1315. On November 30, 1989, Bogard was waiting inside the empty house of a former girlfriend, Sandra Dean. *Id.* Because Bogard had hidden in Sandra's home on previous occasions and threatened to take her life, Sandra and her son, Lamont, searched the house for Bogard upon arriving home that evening. *Id.* When Lamont, armed with his mother's .38 revolver, looked behind a sofa in the living room, Bogard leapt out and shot him in the neck with a small chrome-plated pistol. *Id.* Lamont returned fire, but the court's opinion fails to reveal whether any of Lamont's shots hit Bogard. *Id.* Upon tracking Sandra down, Bogard shot her twice in the head. *Id.* At trial, Bogard claimed shooting Sandra was unintentional and claimed that he shot Lamont in self-de-

Bogard assigned as error[3] the admission of his prior conviction of armed robbery[4] for impeachment purposes.[5] Bogard argued that introducing evidence of a similar prior crime was too prejudicial, and that this prejudice outweighed the probative value of the evidence.[6] The trial court made an on-the-record finding that the probative value of the prior conviction outweighed its prejudicial effect, and the court allowed the evidence to be admitted at trial.[7] Bogard was convicted.[8] On appeal, the Mississippi Supreme Court held: Affirmed.[9] The

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fense. *Id.* at 1316.

[3] *Id.* at 1315. Bogard raised nine separate issues on appeal to the Supreme Court of Mississippi, and the court found that five of the issues raised merited discussion. *Id.* Only one of these five issues—whether Bogard's prior conviction of armed robbery was admissible for impeachment purposes—is discussed herein.

[4] *Id.* Bogard admitted during cross-examination by the prosecution that he had been convicted of armed robbery in 1977. *Id.*

[5] *Id.* The Mississippi Supreme Court quoted the testimony which revealed the prior conviction: "Q. Mr. Bogard, [have] you ever been convicted of an armed robbery? A. Yes, sir, I have. Q. In this court? A. Yes, sir, and I was sentenced by the Honorable Judge Lamb." *Id.*

[6] *Id.* In compliance with Mississippi case law, the trial court first determined whether the prosecution made a prima facie showing that Bogard's prior conviction reasonably bore upon his propensity for veracity. *Id.* To make its prima facie showing, the prosecution offered certified copies of the indictment, judgment and commitment order which confirmed that in 1977 Bogard, armed with a rifle, stole a watch valued at $100 and $3 in cash from the victim. *Id.*

[7] *Bogard*, 624 So. 2d at 1316. The evidentiary rule governing impeachment by evidence of the conviction of a crime states:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the punishment.

Miss. R. Evid. 609(a).

[8] *Bogard*, 624 So. 2d at 1315. Bogard received three consecutive life sentences. *Id.* Also, the court sentenced Bogard as a habitual offender, rendering him ineligible for parole or probation. *Id.*

[9] *Id.* The court affirmed Bogard's convictions of Counts II and III, but held the proof of habitation insufficient in Count I and remanded for resentencing. *Id.* The court held that the proof was insufficient to convict Bogard of burglary of an inhabited dwelling because Sandra and Lamont were not home when Bogard

court held that where a similar prior conviction is offered for impeachment purposes, the evidence is admissible if the prior conviction reasonably bears upon the defendant's propensity for truthfulness, and the court finds the probative value of the evidence outweighs its prejudicial effect.[10]

I. RELATED LAW

A. Admissibility of Prior Convictions at Common Law

The practice of impeaching a witness with evidence of his prior convictions is deeply rooted in common law, where courts initially forbade persons convicted of "infamous crimes" from testifying.[11] Courts eventually softened the rule to allow convicted felons to testify,[12] but the courts also allowed a witness' credibility to be impeached with evidence of prior felony convictions[13] and prior convictions for "*crimen falsi.*"[14]

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actually entered the house. *Id.* at 1319. However, the court held that the proof was sufficient to find Bogard guilty of the lesser included offense of burglary of an unoccupied dwelling under § 97-17-19 of the Mississippi Code. *Id.* at 1319-20. In this case, the distinction makes little difference since Bogard was sentenced as a habitual offender, a designation which carries a sentence of life imprisonment under § 99-19-83 of the Mississippi Code. *Id.* at 1319.

[10] *Bogard*, 624 So. 2d at 1317.

[11] Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 537-38 (1992); *see* 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 42 (4th ed. 1992) (stating that "infamous crimes" included treason, any felony, obstruction of justice, or felony or misdemeanor involving dishonesty or false statement). This common law rule barring testimony was considered ongoing punishment for the crime, and it perpetuated the notion that a person with a prior conviction was not credible. Christian A. Bourgeacq, Note, *Impeachment with Prior Convictions Under Federal Rule of Evidence 609(a)(1): A Plea for Balance*, 63 WASH. U. L.Q. 469, 470 (1985); *see also* 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 519, at 726 (James H. Chadbourn ed. 1979) (stating that person with prior conviction was punished by not being allowed to testify and was not credible).

[12] Bourgeacq, *supra* note 11, at 470. Courts softened the rule against testimony by felons as the courts realized the irrational nature of a rule excluding all evidence simply because it might be offered by a felon. *Id.*

[13] 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 609[02], at 609-29 (1994). The author observed:

> The theory that all convictions are relevant to credibility depends on a two-fold assumption: (1) that a person with a criminal past has a bad

This rule remained basically unchanged[15] until *Luck v. United States*[16] was decided in 1965.

In *Luck*, the court first announced that prior convictions

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general character and (2) that a person with a bad general character is the sort of person who would disregard the obligation to testify truthfully.

Id.; *see also* Ed Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 763 (1990) (stating that evidence of prior conviction tends to make jury distrust witness solely on basis of witness' criminal record); Michael H. Graham, *Prior Conviction Impeachment; Discretionary Balancing; Dishonesty and False Statement*, 21 CRIM. L. BULL. 338, 339 (1985) (stating that employing impeachment evidence of prior conviction was premised on assumption of bad general character evidenced by willingness to disobey law).

[14] Okun, *supra* note 11, at 537-38. At common law, "*crimen falsi*" denoted crimes involving elements of fraud, forgery or deceit that bore directly on credibility. *Id.* at 538 n.24. The rationale for admitting evidence of prior felonies and *crimen falsi* was stated by Justice Holmes:

> [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches the conclusion solely through the general proposition that he is of bad character and unworthy of credit.

Gertz v. Fitchburg R.R., 137 Mass. 77, 78 (1884); *see* Gene R. Nichol, Jr., *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609*, 82 W. VA. L. REV. 391, 405-06 (1980) (quoting *Gertz* and arguing that admitting prior conviction to impeach witness invites jury to infer prior crimes indicate current propensity for witness to lie under oath).

[15] Gainor, *supra* note 13, at 771. The earliest United States Supreme Court case to hold that a prior felony conviction no longer disqualified a witness from testifying was Rosen v. United States, 245 U.S. 467 (1918). In *Rosen*, the Court allowed a co-conspirator to testify, stating that anyone with relevant information should be permitted to testify. *Rosen*, 245 U.S. at 468-69. The prosecution was permitted to impeach the co-conspirator's testimony by evidence which reflected on the witness' credibility, not competency. *Id.*

[16] 348 F.2d 763 (D.C. Cir. 1965). In *Luck*, the trial court admitted evidence of the defendant's prior grand larceny conviction to impeach the defendant. *Luck*, 348 F.2d at 766. The defendant argued that his prior conviction, an offense committed while under the majority age, should not have been admitted. *Id.* at 766-67. The prosecution claimed an absolute right to offer the evidence to impeach the defendant. *Id.*

were not per se admissible.[17] Rather, the court favored a balancing test[18] to weigh the probative value of evidence of a prior conviction against its prejudicial effect to determine whether the evidence should be admitted.[19]

In *Gordon v. United States,*[20] the District of Columbia Circuit reaffirmed *Luck* and introduced several factors against which courts should balance impeachment evidence of prior convictions.[21] The court, in an opinion issued by Circuit Judge (later Chief Justice) Burger, articulated five factors to be considered when a witness with a prior conviction testifies:

(1) The nature of the crime.
(2) The time of the prior conviction and the defendant's subsequent actions and history.
(3) The similarity of the prior and present charges.
(4) The importance of the defendant's testimony.

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[17] *Id.* at 767-68. Because the statute governing admissibility stated that evidence "may" be admitted, rather than "shall" be admitted, the court found the admissibility of prior convictions to be a discretionary, not mandatory requirement of a trial judge. *Id.*

[18] *Id.* at 769. Unlike prior practice at common law and today under the Federal Rules of Evidence and Mississippi Rules of Evidence, this balancing test was performed regardless of whether the prior conviction involved *crimen falsi. Id.* at 767-68. Among the balancing factors suggested by the court were the nature and number of the prior convictions, the age and circumstances of the defendant, and the importance of the prior conviction in relation to the search for truth in the instant case. *Id.* at 769; *see* Okun, *supra* note 11, at 539 n.30 (implying judge should consider whether reciting defendant's criminal record adds to truth or merely makes truth less discernible to jury).

[19] *Luck*, 348 F.2d at 769. The court said occasions might arise where evidence should be admitted despite the prejudicial impact the evidence could have on the jury. *Id.* at 768. For example, the evidence should be admitted if the potentially prejudicial evidence helps the jury better understand the facts and circumstances of the case and the defendant's testimony. *Id.*; *see* MCCORMICK, *supra* note 11, at 153-54 (stating that one view allows judge to balance probative value and prejudicial effect of evidence offered for impeachment purposes before admitting evidence).

[20] 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Gordon was convicted of robbery and assault. *Gordon*, 383 F.2d at 938. On appeal, Gordon argued that the trial court erred in admitting for impeachment purposes his prior conviction for larceny. *Id.*

[21] *See generally* WEINSTEIN, *supra* note 13, § 609[03], at 609-34 (stating that *Gordon* furnishes guide to balancing the probative value and prejudicial effect of impeachment evidence).

(5) The centrality of the credibility issue.[22]

The court held that some crimes may have only a minimal bearing on truthfulness,[23] and suggested that courts use these factors in determining the admissibility of evidence.[24]

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[22] *Gordon*, 383 F.2d at 940-41. In the opinion, Judge Burger did not list the factors specifically, but rather discussed each one in the narrative of the court's opinion. *Id.* These five factors were not recited in list form as the five controlling factors in a balancing test to determine admissibility of prior convictions until several years later. *See* WEINSTEIN, *supra* note 13, § 609[03], at 609-34 to -41 (discussing five factors and subsequent cases which analyze these factors).

[23] *Gordon*, 383 F.2d at 940. The court stated:

> In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty or veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not. . . .

Id.; *see also* WEINSTEIN, *supra* note 13, § 609[03], at 609-35 to -36 (stating that where crime's bearing on veracity is unclear attorneys must convince court on admissibility issue).

[24] *Gordon*, 383 F.2d at 941; *see* Stephen E. House, Recent Decisions, *Evidence—Prior Conviction of a Violent Crime is Not Prima Facie Evidence of Propensity for Untruthfulness Under the Mississippi Rules of Evidence*, 59 MISS. L.J. 627, 630-31 (1989) (stating that guidelines in *Gordon* function to help judges balance probative value and prejudicial effect of impeachment evidence); Carol Chumney, Case Comments, 15 MEM. ST. U. L. REV. 451, 456-57 n.28 (1985) (stating that several circuits, including Fifth Circuit, utilize all five *Gordon* factors, but other circuits only utilize some factors).

B. *Federal Rule of Evidence 609*

"Probably no single [Federal] Rule [has] provoked as much controversy as Rule 609."[25] The debate over whether to follow older common law rules allowing the admissibility of any felony conviction to impeach credibility or to embrace the rules espoused in *Luck* and *Gordon* caused discord in Congress,[26] and resulted in a rule containing some elements from older common law and some elements from *Luck* and *Gordon*.[27]

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[25] 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 634 (5th ed. 1990). As debate intensified over the proposed Federal Rules of Evidence, some lawmakers and commentators supported the common law rule admitting any and all prior felony convictions, and other lawmakers and commentators looked with favor on the more recent *Luck* and *Gordon* rules. *Id.*; *see* United States v. Smith, 551 F.2d 348, 360 (D.C. Cir. 1976) (stating Rule 609 was among "most hotly contested provisions in the Federal Rules of Evidence").

[26] H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7084 [hereinafter HOUSE REPORT]; S. REP. NO. 1277, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060-61 [hereinafter SENATE REPORT]. The Advisory Committee draft was revised by the Judiciary Committee's Subcommittee on Criminal Justice in the House of Representatives, and the subcommittee added a balancing provision to the rule. HOUSE REPORT, *reprinted in* U.S.C.C.A.N. at 7084. The amendment to the draft allowed a court to determine whether evidence of felonies which are not *crimen falsi* but are more prejudicial than probative should be admitted. *Id.* The House adopted this version after extensive floor debate. 120 CONG. REC. 2375-81 (1974). In the Senate, the Judiciary Committee tinkered with a version of the House rule and, after extensive debate and counter-proposals offered on the Senate floor, the Senate passed a version which contained no balancing provision, automatically allowed evidence of felonies and *crimen falsi*, and closely resembled the original Advisory Committee draft. 120 CONG. REC. 37,075, 37,083 (1974), SENATE REPORT, *reprinted in* U.S.C.C.A.N. at 7061.

[27] FED. R. EVID. 609(a); *see also* MCCORMICK, *supra* note 11, at 154 (stating that Federal Rule 609 is compromise); SALTZBURG, *supra* note 25, at 634-35 (same). A Conference Committee was appointed to resolve the differences in the two bills. Gainor, *supra* note 13, at 775. The House adopted the compromise rule first. 120 CONG. REC. 40,896-97 (1974). In the same month, the Senate adopted the compromise rule. *Id.* at 40,069-70.

The rule included a balancing provision to be used when confronted with evidence of prior felony convictions which are not *crimen falsi*, but automatically allowed evidence of prior convictions for *crimen falsi*. FED. R. EVID. 609(a). The Rule was amended in 1987 for technical reasons but was not substantively changed. *Id.* In 1990, part (a) of the Rule was amended to: (1) remove the limitation that evidence of prior convictions must be elicited on cross-examination; and (2) emphasize that the general balancing test in Rule 403 of the Federal Rules of

Despite Congress' failure to recognize the balancing test and *Gordon* factors, the Seventh Circuit utilized these factors in *United States v. Mahone* two years after the Federal Rules of Evidence were adopted.[28] The Seventh Circuit mandated an on-the-record balancing of the *Gordon* factors and an explicit determination of whether the probative value of impeachment evidence of a prior conviction outweighed the prejudicial effect.[29]

Evidence should be employed when attempting to impeach witnesses in civil cases or government witnesses in criminal cases. SALTZBURG, *supra* note 25, at 196-97 (Supp. 1994); *see also* Patrick A. Tuite, *Amendments Clarify Impeachment Under Rule 609*, CHI. DAILY L. BULL., March 7, 1990, at 3 (discussing balancing tests used for civil witnesses and criminal defendants). The current version of Rule 609(a) states:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a).

[28] United States v. Mahone, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976). In *Mahone*, the defendant was convicted of possession of an unregistered firearm and assigned as error on appeal the admission of his prior robbery conviction for impeachment purposes. *Id.* at 928. The trial court weighed the probative value and the prejudicial effect of the evidence and admitted the evidence. *Id.* The Seventh Circuit Court of Appeals held that the trial court did not err in admitting the evidence after the trial court made an explicit determination that the probative value of the prior conviction outweighed the prejudicial effect of the evidence. *Id.* at 928-30.

[29] *Id.* at 929. This explicit, on-the-record balancing test exceeded the requirements of the Federal Rules of Evidence. FED. R. EVID. 609(a). The court also urged other courts to follow the lead of the Seventh Circuit and conduct an on-the-record hearing concerning the admissibility of prior convictions for impeachment purposes. *Mahone*, 537 F.2d at 929. Making such determinations on the record, the court noted, allows the appellate court to more easily determine whether the trial court acted properly in admitting or denying the admission of such impeachment evidence. *Id.*

The Fifth Circuit Court of Appeals joined the Seventh Circuit in conducting on-the-record determinations in 1979. *See* United States v. Preston, 608 F.2d 626,

C. *Mississippi Rule of Evidence 609 and Case Law*

Early Mississippi common law regarding the impeachment of a witness with evidence of a prior conviction mirrored the common law of the rest of the country by disqualifying felons from testifying.[30] Later, courts permitted felons to testify, but evidence of prior convictions could be freely raised.[31] A 1972 statute amended this practice, but the ability to impeach a witness through the admission of any prior conviction lingered.[32] The license to impeach in this manner continued until Mississippi adopted the Mississippi Rules of Evidence effective January 1, 1986.[33]

The Mississippi Supreme Court first applied the Mississippi version of Rule 609 the following year in *Peterson v. State*.[34] In *Peterson*, the defendant faced trial for the sale of marijuana and contended that his prior conviction for the sale of marijua-

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639 (5th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980). In adopting the principles espoused in *Mahone*, the Fifth Circuit Court of Appeals stated that on-the-record determinations are useful to ensure trial courts adhere to the guidelines for admitting evidence of prior convictions. *Preston*, 608 F.2d at 639 (citing WEINSTEIN, *supra* note 13, § 609[04], at 609-54, and *Mahone*, 537 F.2d at 929).

[30] MCCORMICK, *supra* note 11, at § 42; *see also* Tarleton David Williams, Jr., Comment, *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMPLE L. REV. 893, 912-15 (1992) (analyzing Mississippi case law regarding impeachment evidence and similarities and differences between Federal and Mississippi versions of Rule 609). The Mississippi courts followed the prevailing common law rule that felons and other witnesses previously convicted of a felony could not testify. Williams, *supra* note 30, at 912.

[31] Williams, *supra* note 30, at 912. Courts considered neither the probative value nor the prejudicial effect of the impeachment evidence. *Id.*

[32] MISS. CODE ANN. §§ 13-1-11, -13 (1972); *see* Williams, *supra* note 30, at 912 n.135 (stating that both statutes allow for admission of any prior felony conviction).

[33] Order Adopting the Mississippi Rules of Evidence, *reprinted in* MISSISSIPPI RULES OF COURT 216-17 (West 1994). In adopting the rules, Mississippi became one of eight states to adopt in substance FED. R. EVID. 609. *Compare* MISS. R. EVID. 609(a), *supra* note 7, *and* FED. R. EVID. 609(a), *supra* note 27. The other seven states are New Hampshire, New Mexico, North Dakota, Oklahoma, Utah, Washington and Wyoming. GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA ch. 43.2, at 2 n.3 (1987). Two of these states, Utah and Wyoming, adopted the Federal Rule verbatim. *Id.* at 2.

[34] 518 So. 2d 632 (Miss. 1987).

na was inadmissible for impeachment purposes.[35] In holding that the evidence was improperly offered, the court stated, "We hold today that Rule 609(a)(1) requires the trial judge to make an on-the-record determination that the probative value of the prior conviction outweighs its prejudicial effect[36] before admitting any evidence of a prior conviction."[37]

In 1988, in *McInnis v. State*,[38] the court demonstrated that Mississippi applied Rule 609 differently than the federal courts. The *McInnis* court held that one offering impeachment evidence of a prior conviction must first meet a threshold burden of making a prima facie showing that the evidence has probative value.[39] This threshold burden required a showing of the witness' propensity for veracity before the court applied any balancing test.[40] In *McInnis*, the court held that a conviction

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[35] *Peterson*, 518 So. 2d at 634. When the prosecutor asked whether the defendant had been previously convicted of a felony, the defendant objected, citing the new Mississippi Rule. *Id.* The trial court overruled the objection and ordered the defendant to answer the question. *Id.*

[36] *Id.* at 636. Because the holding required a new trial, and because this was the first case applying Rule 609, the court discussed the Rule in detail. *Id.* at 636-38.

[37] *Peterson*, 518 So. 2d at 637-38. Citing *Preston* and *Gordon*, the court listed the five factors to be considered in the on-the-record determination. *Id.* The five factors listed were:

(1) The prior felony conviction's impeachment value.
(2) The remoteness of the prior conviction and the witness' criminal record prior to the present charge.
(3) The similarity of the prior conviction and the present charge.
(4) The importance of the witness' testimony.
(5) The importance placed on the witness or defendant credibility.

Id. at 637; *cf. supra* note 22 and accompanying text.

The following year, the Supreme Court of Mississippi further instructed trial courts on the application of Rule 609 when it held misdemeanor convictions inadmissible to impeach a defendant. Ivy v. State, 522 So. 2d 740, 744 (Miss. 1988). The *Ivy* court held that no balancing test was required because the prosecution failed to meet one of the most basic requirements of the rule—that the prior conviction be a felony. *Id.* The court reiterated that felony convictions offered as impeachment evidence are subject to a balancing test, but *crimen falsi* convictions are per se admissible. *Id.*

[38] 527 So. 2d 84 (Miss. 1988).

[39] *McInnis*, 527 So. 2d at 88-89; *see* Williams, *supra* note 30, at 914-15 (discussing Mississippi application of Rule 609).

[40] *McInnis*, 527 So. 2d at 89; *see* House, *supra* note 24, at 636-37 (stating

for a violent felony was not prima facie evidence of a conviction for a defendant's tendency to lie.[41]

In the same year in *Signer v. State*,[42] the defendant assigned as error the court's failure to conduct an on-the-record finding regarding whether the probative value of the defendant's prior conviction outweighed the prejudicial effect of admitting such evidence.[43] The court agreed that the trial court's failure to conduct such a finding amounted to prejudicial error.[44]

D. Mississippi's Erratic History on Similar Crimes

Since the introduction of the *Gordon* factors, courts have regularly stated that similar prior convictions are very prejudicial and weigh heavily in determining whether courts should admit such evidence.[45] In Mississippi, the case law reveals

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that, in *McInnis*, Mississippi adds preliminary step of prima facie showing of propensity for truthfulness to balancing test).

[41] *McInnis*, 527 So. 2d at 88-89. McInnis was charged with robbery in the Circuit Court of Hinds County. *Id.* at 84-85. The prosecution offered evidence for impeachment purposes of a prior conviction for arson. *Id.* at 85. The court stated that the prosecution erroneously argued that the prior conviction was admissible merely because the prior conviction was a violent felony. *Id.* at 89. The court further noted, "The fact that an individual commits a crime of violence has no per se relevance to his or her propensity for truthfulness." *Id.* Because the prosecution failed to make a prima facie showing regarding the defendant's propensity for truthfulness, the trial court committed reversible error in conducting the balancing test. *Id.* at 89-90.

[42] 536 So. 2d 10 (Miss. 1988).

[43] *Signer*, 536 So. 2d at 12. Signer was convicted of sexual battery. *Id.* at 10-11. He had previously been convicted "of bank robbery, assault with a dangerous weapon in the commission of bank robbery and unlawful use of a firearm [during] the commission of a felony." *Id.* at 12. One issue involved whether the defendant's prior record had been expunged, but the court said this was irrelevant in light of the plain error of not conducting an on-the-record finding of the probative value of the evidence. *Id.* at 11-12.

[44] *Id.* at 13. The court added that the trial judge should state the reason for his finding on the record, and the failure to make an on-the-record finding could result in reversal. *Id.*

[45] Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967). The court noted:

> Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of

sporadic results when the courts have been faced with evidence of prior similar convictions. *Peterson*, the original Mississippi case interpreting Rule 609, noted that the defendant would be highly prejudiced by impeachment evidence which showed he had been previously convicted of a crime similar to the present charge.[46] The following year in *Johnson v. State*,[47] the court prohibited evidence of a prior rape conviction in the trial of a man charged with rape, because the prejudicial effect of the

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> the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly. . . .

Gordon, 383 F.2d at 940; *see also* United States v. Brackeen, 969 F.2d 827, 829 (9th Cir. 1992) (holding that prior conviction of bank robbery was too prejudicial to be admitted under Rule 609(a) where defendant was again charged with bank robbery).

The Fifth Circuit has recognized the prejudicial effect of evidence of similar prior acts, and the authorities agree that similar convictions are highly prejudicial. United States v. Diaz, 585 F.2d 116, 118 (5th Cir. 1978). The court in *Diaz* found that the failure of the trial court to give a limiting instruction to the jury constituted error when the trial court admitted evidence showing the defendant was convicted of charges "identical to those for which he was presently on trial." *Diaz*, 585 F.2d at 117, 118; *see also* WEINSTEIN, *supra* note 13, § 609[02] at 609-30 (stating that similar prior conviction suggests to jury that defendant committed present charged crime).

More than 60 years ago, Judge Hand noted that admitting evidence of a similar, prior conviction, then reminding the jury the evidence is admissible only to impeach the defendant credibility is akin to instructing the jury to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else." [sic]. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932).

[46] *Peterson*, 518 So. 2d at 634-35. The court held that evidence of a prior conviction of possession of marijuana was very similar and highly prejudicial in the defendant's present trial for sale of marijuana. *Id.* at 637. The court stated the similarity of the charges greatly increased the prejudicial effect of the evidence. *Id.*

Other non-Rule 609 cases also indirectly suggested similar crimes were prejudicial by holding that admitting evidence of a co-indictee's conviction of the same crime that the defendant faced in his trial was reversible error. In *Buckley v. State*, the Supreme Court of Mississippi held that admission of evidence that a co-indictee pled guilty constituted reversible error because a co-indictee's plea or conviction did not shed light on the defendant's guilt. Buckley v. State, 223 So. 2d 524, 527-28 (Miss. 1969); *see* McCray v. State, 293 So. 2d 807, 809-10 (Miss. 1974) (holding evidence of co-indictee's conviction of murder constitutes reversible error).

[47] 525 So. 2d 809 (Miss. 1988).

evidence clearly outweighed the probative value of the evidence.[48] The court, however, reached a different result in 1989 in *Hawkins v. State*, and admitted evidence of a prior armed robbery conviction in the trial of a man once again charged with robbery.[49] In *Hawkins*, the court deferred to the trial court's ruling that the probative value outweighed the prejudicial effect of the evidence and affirmed the lower court's decision.[50] This practice continued in *Saucier v. State*, where the trial court found a prior murder conviction probative in the case of a defendant charged with armed robbery.[51] The Mississippi Supreme Court held that the trial court had conducted an on-the-record hearing and properly admitted the evidence.[52]

On the heels of *Saucier*, the court decided *Jordan v. State*.[53] In *Jordan*, the Mississippi Supreme Court refused to

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[48] *Johnson*, 525 So. 2d at 812. On appeal the court balanced the five *Gordon* factors, and held that admitting a prior conviction similar to the present charge was highly prejudicial and not sufficiently probative. *Id.* at 812-13.

The Supreme Court of Mississippi also reversed several cases involving the admissibility of a similar crime not because the evidence was prejudicial, but because the trial court failed to balance the *Gordon* factors in an on-the-record hearing. *See* Pugh v. State, 584 So. 2d 781, 785 (Miss. 1991) (holding defendant charged with burglary cannot be impeached with evidence of prior burglary if trial court does not conduct on-the-record probative hearing); McGee v. State, 569 So. 2d 1191, 1195-96 (Miss. 1990) (holding defendant charged with armed robbery and aggravated assault cannot be impeached with evidence of rape, assault, burglary or robbery if trial court does not conduct on-the-record probative hearing).

[49] 538 So. 2d 1204, 1206-07 (Miss. 1989).

[50] *Hawkins*, 538 So. 2d at 1207. The Mississippi Supreme Court recognized that similar prior convictions are highly prejudicial, but affirmed the trial court's ruling by concluding that the trial court did not commit an abuse of discretion in weighing the factors. *Id.* at 1206-07; *see also* Rowe v. State, 562 So. 2d 121, 123 (Miss. 1990) (holding evidence of similar prior conviction admissible if defendant testifies he would not commit such crimes).

[51] 562 So. 2d 1238, 1245 (Miss. 1990). Saucier argued on appeal that the judge's ruling that the prior conviction was admissible had a chilling effect and prompted Saucier not to testify. *Saucier*, 562 So. 2d at 1245.

[52] *Id.* at 1246. The court found that an error was committed. *Id.* However, the court held that the court committed no error of such a serious nature that reversal was mandated. *Id.* Nonetheless, two years later, the Supreme Court of Mississippi suggested that admission of similar, prior convictions might be an abuse of discretion worthy of reversal since "similar crimes typically should not be admitted unless they bear on credibility." Johnson v. Fargo, 604 So. 2d 306, 310 n.1 (Miss. 1992).

[53] 592 So. 2d 522 (Miss. 1991). Jordan appealed his conviction of armed rob-

rely on the trial court's balancing of factors and, on appeal, reapplied the balancing test and held that evidence of a prior rape conviction was inadmissible in the present armed robbery trial.[54] The court rendered two more decisions in 1992—*Townsend v. State* and *Tillman v. State*—that suggested evidence of similar prior convictions generally would be too prejudicial.[55] In *Townsend*, the court held that the prosecution could not admit a prior burglary conviction as impeachment evidence against a defendant charged with burglary because such evidence would be too prejudicial.[56] Justice Pittman, however, dissented and first voiced the argument that a burglary conviction indicates a defendant's propensity for veracity, and therefore the court should admit the evidence.[57] Two

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bery and assigned as error the admission of his prior conviction of rape. *Jordan*, 592 So. 2d at 523.

[54] *Id.* at 523-24. The case was reversed and remanded for a new trial excluding the prior conviction. *Id.* at 524.

[55] 605 So. 2d 767, 770-71 (Miss. 1992); 606 So. 2d 1103, 1107-08 (Miss. 1992). *Tillman* is also referred to by the Supreme Court of Mississippi when cited as authority in later cases such as *Stevenson v. State*. *See* Bogard v. State, 624 So. 2d 1313, 1323-24 (Miss. 1993) (referring to *Tillman* as *Stevenson*).

[56] *Townsend*, 605 So. 2d at 770-71. The court found that burglary was not necessarily a crime which suggested a tendency to lie or engage in dishonesty. *Id.* at 770. The court held that this fact, considered along with the similarity of the crimes, warranted a finding that the prejudicial effect of the prior conviction impeachment evidence outweighed the probative value of the evidence. *Id.* at 770-71.

[57] *Townsend*, 605 So. 2d at 771 (Pittman, J., dissenting). Justice Pittman argued that theft crimes reflect on a witness' veracity and thus have more probative value despite the fact that the crime is similar to the present charge. *Id.* at 771-72 (Pittman, J., dissenting).

Two years prior to *Townsend*, the Washington Supreme Court adopted a similar, pro-admission view when it held in *State v. Ray* that theft crimes constitute *crimen falsi* and are per se admissible. State v. Ray, 806 P.2d 1220, 1227-29 (Wash. 1991). In *Ray*, the defendant was convicted of first degree incest and assigned as error the trial court's refusal to admit evidence of a witness' prior conviction for first degree theft. *Ray*, 806 P.2d at 1227. The Washington Supreme Court overruled precedent case law on the subject and held that theft crimes involve dishonesty and are per se admissible. *Id.* at 1228. For this and other reasons raised on appeal, the Supreme Court reversed and remanded the case to the trial court. *Id.* at 1231-32; *see also* Wicks v. State, 535 A.2d 459, 461 (Md. 1988) (holding 35-year-old petit larceny conviction per se admissible because theft crimes constitute *crimen falsi*). The court overturned the rule in *Wicks* in the 1993 case of *Beales v. State*, which held that felonies involving "*crimen falsi*,"

weeks later, the court held in *Tillman* that the state could not impeach a defendant charged with burglary with evidence of a prior burglary conviction because the prosecution failed to make a prima facie showing of why the evidence was probative.[58] This ruling prompted a concurring and dissenting opinion by Justice Banks,[59] which echoed Justice Pittman's prior argument that burglary convictions have inherent probative value,[60] although Justice Banks recognized that the balancing test could still render impeachment evidence inadmissible.[61]

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including theft crimes, are not per se admissible, but must be weighed in a balancing test. Beales v. State, 619 A.2d 105, 109 (Md. 1993).

[58] *Tillman*, 606 So. 2d at 1108. This ruling resurrected the requirement introduced in *McInnis v. State* that a preliminary step to balancing the *Gordon* factors is that the party offering the impeachment evidence must make a prima facie showing that the evidence has probative value. McInnis v. State, 527 So. 2d 84, 89 (Miss. 1988).

[59] *Tillman*, 606 So. 2d at 1108 (Banks, J., dissenting). Justice Pittman did not participate in the *Tillman* decision. *Id.* (Banks, J., dissenting).

[60] *Id.* (Banks, J., dissenting). Justice Banks said he believed burglary crimes have probative value with regard to a witness' propensity for truthfulness. *Id.* (Banks, J., dissenting).

[61] *Id.* (Banks, J., dissenting). Justice Banks implied that burglary crimes are not *crimen falsi* which are automatically admissible. *Id.* (Banks, J., dissenting). However, he argued that burglary crimes are more probative than the general category of felonies included in Rule 609(a)(1). *Id.* (Banks, J., dissenting).

The Mississippi Supreme Court has decided one Rule 609 case since the *Bogard* decision. *See* Hopkins v. State, 639 So. 2d 1247 (Miss. 1993). In *Hopkins*, the defendant assigned as error the admission during his present trial for sexual battery of a prior conviction of touching a child for lustful purposes. *Hopkins*, 639 So. 2d at 1248. During the hearing by the trial court on the admissibility of the prior conviction, the prosecution called a social worker to testify that pedophiles are unable to tell the truth. *Id.* The trial court found pedophilic crimes are probative of a propensity for truthfulness and admitted the evidence. *Id.* On appeal, the court weighed the *Gordon* factors and, with regard to similarity of crimes, noted that Hopkins' prior offense was "incredibly prejudicial." *Id.* at 1253. However, because the trial court performed an on-the-record hearing on the probative value of the evidence, the court did not reverse the trial court's ruling for that purpose. *Hawkins*, 639 So. 2d at 1254. The court concluded, however, that evidence of the prior, similar crime that did not involve dishonesty was inadmissible and remanded the case. *Id.*

II. *BOGARD V. STATE*

A. Opinion of the Court

In *Bogard v. State*, the court noted that a defendant runs the risk of being impeached with evidence of a prior conviction should he elect to testify.[62] The court then stated that the trial court did not err in admitting evidence of the prior conviction.[63] Citing *Saucier*, the court noted that the prosecution satisfied the first requirement by making a prima facie showing that the prior conviction bears on the witness' propensity for veracity.[64] The court then acknowledged that the trial court properly conducted an on-the-record finding that the probative value of the prior conviction outweighed the prejudicial effect of the evidence.[65]

The court cited two facts which prefaced its ruling. First, as evidence of the probative value of the prior conviction, the prosecution "introduced a certified copy of the indictment, judgment and commitment order relative to the armed robbery."[66] Then the court noted that prior convictions are not admissible pursuant to Rule 609 except for the purpose of impeaching the credibility of a witness.[67] Building on these two principles, the court cited *Gordon* and stated that "[i]n common human experience acts of deceit, fraud, cheating or *stealing* . . . are universally regarded as conduct which reflects adversely on a man's

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[62] Bogard v. State, 624 So. 2d 1313, 1316 (Miss. 1993) (citing Hawkins v. State, 538 So. 2d 1204, 1206 (Miss. 1989)).

[63] *Bogard*, 624 So. 2d at 1316. The court stated that the trial court was within its discretion in allowing impeachment evidence of the prior conviction. *Id.*

[64] *Id.* Though the court cited *Saucier* as authority, it was *McInnis v. State*, decided two years prior to *Saucier*, which introduced the requirement that the party offering the impeachment evidence make a prima facie showing that the evidence bears on the witness' propensity for truthfulness. McInnis v. State, 527 So. 2d 84, 89 (Miss. 1988).

[65] *Bogard*, 624 So. 2d at 1316. As authority, the court cited nearly every Mississippi case which considered a Rule 609 issue since the Mississippi Rules of Evidence took effect in 1986. *Id.*

[66] *Id.* These documents were offered to make the prima facie showing that the prior conviction had probative value. *Id.*

[67] *Id.* at 1317. The court cites *McInnis* as authority for this rule. *Id.* at 1316-17.

honesty and integrity."[68] The court rephrased this statement as "crimes which involve theft have at least some probative value for assessing [the] credibility of the witness."[69] Applying this rule to Bogard's case, the court found that since Bogard's prior armed robbery conviction involved stealing money, it had some "intrinsic probative value regarding Bogard's propensity for truthfulness while under oath."[70] Therefore, the court reasoned, the prosecution made a prima facie showing of probative value.[71]

The court then reviewed the trial court's on-the-record hearing of the probative value of the evidence.[72] In considering the trial court's balancing of the *Gordon* factors, the court confirmed that the balancing test weighed in favor of admissibility of all factors except the importance of the testimony.[73] The court concluded that the prior conviction was admissible.[74]

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[68] *Id.* (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (emphasis in original), *cert. denied*, 390 U.S. 1029 (1968)).

[69] *Id.* This statement in the majority opinion of *Bogard* was stated twice in the preceding year in dissenting opinions by the Mississippi Supreme Court. Tillman v. State, 606 So. 2d 1103, 1108 (Banks, J., dissenting) (Miss. 1992); Townsend v. State, 605 So. 2d 767, 771 (Pittman, J., dissenting) (Miss. 1992).

[70] *Bogard*, 624 So. 2d at 1317. As authority for this application of the rule to the facts of *Bogard*, the court cited Turner v. State, 573 So. 2d 1335, 1339 (Miss. 1990) (holding prior conviction of grand larceny admissible if defendant testifies).

[71] *Bogard*, 624 So. 2d at 1317.

[72] *Id.* The court noted that the trial court also considered the fact that the jury knew from a tape recording it heard that Bogard had been in jail at some point prior to trial. *Id.* Because Bogard's attorney offered the tape recording revealing Bogard's previous incarceration, the trial court found the evidence of Bogard's prior conviction less prejudicial. *Id.* The opinion did not reveal the purpose of the tape recording, but it did note that the trial court gave a limiting instruction to the jury before allowing Bogard to offer the tape recording. *Id.*

[73] *Id.* The court resolved the fourth factor concerning the importance of Bogard's testimony in his favor because Bogard was the only witness in his defense. *Id.*

[74] *Id.* On appeal, the court did not discuss the five balancing factors individually or weigh the strengths and weaknesses of each factor individually in the opinion. *Id.*

B. Dissenting Opinions

1. Dissent of Justice Sullivan

Justice Sullivan stated that the prosecution failed to make a prima facie showing because "only offenses in the nature of *crimen falsi* have intrinsic probative value regarding the offender's propensity for truthfulness while under oath."[75] Justice Sullivan added that Mississippi Rule 609 does not recognize burglary as a crime with intrinsic probative value, but the crime does have "intrinsic prejudicial value."[76]

Justice Sullivan countered the majority opinion's quote from *Gordon* with the assertion that the majority of federal courts, contrary to *Gordon*, have found that theft crimes are not *crimen falsi*.[77] Further, to take such a position would be to rule in contravention of standing Mississippi case law in *Tillman* and *Townsend*.[78] In closing, Justice Sullivan stated

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[75] *Bogard*, 624 So. 2d at 1322-23 (Sullivan, J., dissenting) (emphasis in original). Justice Sullivan stated that in cases of *crimen falsi*, "the dishonesty or the false statement is the crime, or at least an *element of* the crime." *Id.* at 1322 (Sullivan, J., dissenting) (emphasis in original). As support, Justice Sullivan cited the statutes defining and listing the elements of crimes such as perjury, false representation, and embezzlement because those crimes involve *crimen falsi*. *Id.* at 1322-23 (Sullivan, J., dissenting). In addition, Justice Sullivan noted that the majority opinion properly stated that a party seeking admissibility of a prior conviction must make a prima facie showing of probative value before the court conducts an on-the-record hearing. *Id.* at 1322 (Sullivan, J., dissenting).

[76] *Id.* at 1323 (Sullivan, J., dissenting). Justice Sullivan argued that prior convictions are highly prejudicial. *Id.* (Sullivan, J., dissenting). His argument was based on the idea that many may improperly conclude that a felon is more apt to lie or commit another crime than a non-felon. *Id.* (Sullivan, J., dissenting).

[77] *Id.* (Sullivan, J., dissenting). Justice Sullivan's statement took the majority opinion's rationale for admitting burglary convictions one step further by suggesting that the majority would classify burglary crimes as *crimen falsi*. *Id.* (Sullivan, J., dissenting).

[78] *Bogard*, 624 So. 2d at 1323 (Sullivan, J., dissenting); *see* Tillman v. State, 606 So. 2d 1103, 1107-08 (Miss. 1992) (holding defendant failed to make prima facie showing that burglary conviction of witness was indicative of propensity for truthfulness and court should not have admitted conviction for impeachment purposes); Townsend v. State, 605 So. 2d 767, 770 (Miss. 1992) (holding burglary not admissible as *crimen falsi*). Justice Sullivan also cited *Johnston v. State* as authority. *Bogard*, 624 So. 2d at 1323 (Sullivan, J., dissenting); *see* Johnston v. State, 618 So. 2d 90, 94 (Miss. 1993) (holding that allegation of prior robbery not indicative of propensity for truthfulness). *Johnston* did not involve Rule 609 since

that, though a trial court has discretion in allowing impeachment evidence, the trial court must act within the bounds of the Mississippi Rules of Evidence and to admit Bogard's prior conviction is to disregard these rules.[79]

2. *Dissent of Justice McRae*

Justice McRae joined in Justice Sullivan's dissent.[80] He also stated that *Townsend* and *Tillman* are controlling and the majority should not have ruled as it did in *Bogard* without overruling *Townsend* and *Tillman*.[81]

III. Discussion

The *Bogard* decision confirms what one might have suspected by reviewing the case law preceding *Bogard*: The Mississippi Supreme Court finds certain aspects of evidentiary common law appealing in certain fact scenarios which leads to conflicting decisions when the body of law interpreting Rule 609 is viewed as a whole.[82] Depending on the nature of the crimes involved and the trial court's level of care in adhering to Mississippi Rule 609, the supreme court's decision on appeal can range from a nondescript affirmation with the simple explanation that the trial court did not abuse its discretion,[83] or a reversal which gives remedial tips to trial courts on how to properly apply Rule 609.[84]

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the evidence did not concern a prior conviction, but the Supreme Court still noted that such activities have little bearing on truthfulness. *Johnston*, 618 So. 2d at 93-94.

[79] *Bogard*, 624 So. 2d at 1323-24 (Sullivan, J., dissenting). Justice Sullivan said the evidence was "substantially prejudicial to Bogard" and the court should have ordered a new trial. *Id.* at 1324 (Sullivan, J., dissenting).

[80] *Bogard*, 624 So. 2d at 1324 (McRae, J., dissenting).

[81] *Id.* at 1324 (McRae, J., dissenting).

[82] *Compare, e.g.*, Hawkins v. State, 538 So. 2d 1204, 1206-07 (Miss. 1989) (holding similar prior conviction admissible for impeachment purposes) *with* Townsend v. State, 605 So. 2d 767, 770-71 (Miss. 1992) (holding similar prior conviction inadmissible for impeachment purposes).

[83] *See* Johnson v. State, 525 So. 2d 809, 812 (Miss. 1988) (holding appellate court must determine whether trial court abused discretion in admitting prior conviction as impeachment evidence).

[84] *See, e.g.*, McGee v. State, 569 So. 2d 1191, 1195-97 (Miss. 1990) (holding

A. Affirmation of Obedient Trial Courts

Mississippi case law applying Rule 609 reveals that a trial court's ruling is often affirmed if the trial court strictly adhered to the steps required to determine whether the probative value of impeachment evidence outweighed its prejudicial effect.[85] The court bases its reluctance to reverse in such cases on the fact that the trial court has firsthand knowledge of the issue, and the appellate court reviews after the fact.[86]

On the other hand, the court has often reversed trial court rulings, not based on a determination that the evidence was too prejudicial, but because the trial court failed to follow Mississippi's guidelines regarding a prima facie showing of probative value and the balancing test.[87] This strict adherence to procedure is designed to protect the rights of the witness, but these safeguards sometimes trump substantive issues. In one opinion, the court will denounce the admission of evidence of similar crimes, suggesting that evidence of a similar prior conviction should be scrutinized and weighed heavily.[88] Later, the court will face a similar fact pattern but, because the trial court followed its Rule 609 checklist, the supreme court's decision will not turn on the issue of similarity.[89] In *Bogard*, the

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failure to make on-record balancing is reversible error); Signer v. State, 536 So. 2d 10, 12-13 (Miss. 1988) (holding failure to make prime facie showing is reversible error).

[85] When the trial court makes an explicit record of the prima facie showing and conducts an exhaustive balancing of the factors, the Mississippi Supreme Court is less inclined to find that the trial court ruled improperly. *See* Saucier v. State, 562 So. 2d 1238, 1245-46 (Miss. 1990) (holding prior murder conviction admissible because trial court weighed probative value and prejudicial effect of evidence); *Hawkins*, 538 So. 2d at 1206-07 (holding admission of similar, prior conviction not improper when trial court weighed probative value and prejudicial effect of evidence); *see also supra* notes 48-50 and accompanying text.

[86] *See supra* note 51 and accompanying text.

[87] *See supra* note 47 and accompanying text (holding in Pugh v. State, 584 So. 2d 781 (Miss. 1991) and McGee v. State, 569 So. 2d 1191 (Miss. 1990), that cases contain reversible error because balancing test not applied).

[88] *See* Johnson v. Fargo, 604 So. 2d 306, 310 n.1 (Miss. 1992) (holding that similar convictions are highly prejudicial); *supra* notes 45, 51 and accompanying text.

[89] *See* Bogard v. State, 624 So. 2d 1313, 1317 (Miss. 1993) (discussing only

court did not consider the similarity of the crimes, despite Bogard's contention and the prior case law indicating that admission of similar crimes was potential error.[90] The result is cases such as *Bogard* and *Townsend*, where both are based on Fact Scenario A, but the court reaches Conclusion B in one and Conclusion C in the other.[91]

B. Returning to the Familiar Common Law Path

The Mississippi Supreme Court's willingness to affirm rulings by deferring to a trial court's discretion suggests that the court is both expanding and narrowing the Mississippi version of Rule 609 at the same time. The court is adopting new tests and steps for the trial courts to apply in interpreting Rule 609, thereby expanding the scope of the rule through the addition of non-codified rules and factors.[92] But the court is also deferring to a trial court's discretion more frequently when the trial court follows Mississippi's guidelines for applying Rule 609.[93] In practice, this has resulted in the admission of similar prior convictions when the trial court conducts a hearing to determine prima facie showing and then balances the factors before admitting the evidence.[94] The result is a catch twenty-two: A court following procedure receives less scrutiny on the substantive law it employed because it adheres to the supreme court-imposed safeguards, and a court failing to follow procedure is heavily scrutinized on the substantive law it employed.[95] This trend has resulted in cases which more closely

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fourth factor in balancing test on appeal).

[90] *See Bogard*, 624 So. 2d at 1317 (failing to discuss similarity of crimes in opinion).

[91] *See supra* notes 48-49, 54-60 and accompanying text.

[92] *See* Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (discussing relevant factors courts should weigh); *supra* notes 20-24, 38-41 and accompanying text; *see also* legislative history of the Federal Rules of Evidence at *supra* notes 25-27 and accompanying text.

[93] *See Bogard*, 624 So. 2d at 1317 (revealing factors not individually discussed and weighed on appeal); *see also supra* note 73 and accompanying text.

[94] *See* Hawkins v. State, 538 So. 2d 1204, 1206-07 (Miss. 1989); *see also supra* notes 47-49 and accompanying text.

[95] *See* Pugh v. State, 584 So. 2d 781, 785 (Miss. 1991) (holding defendant

resemble the pattern in Mississippi before the court adopted the Mississippi Rules of Evidence.[96] While trial courts more stringently follow the balancing test today, the courts are freer in admitting prior convictions which were automatically admissible under pre-Rule 609 common law.[97] The court's new willingness to admit similar prior convictions suggests the resurrection of legal principles which have not existed in Mississippi for almost a decade.[98]

For example, the reemergence of the idea that burglary and theft crimes have intrinsic probative value on the issue of truthfulness contradicts contemporary Mississippi case law[99] and harkens back to cases that first grappled with whether crimes other than *crimen falsi* could have intrinsic probative value.[100] Despite the majority of federal courts disregarding the idea that burglary and theft crimes have intrinsic probative value,[101] the Mississippi Supreme Court has resurrected the quarter-century-old premise in recent cases, first in dissenting opinions in *Townsend* and *Tillman*, then as the majority opinion in *Bogard*.[102] This ruling by the court indicates that judicial discretion will allow in the future for a wider range of prior convictions to be admitted regardless of their similarity to the present charges. The limit to the future impact of *Bogard* is that the trial court will continue to wield its expanded power so long as it does not stray from the rules which grant this power. That is, trial court decisions will tend to be affirmed so long as the trial court employs the prima facie showing of probative value and the balancing test in reaching its decision.

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charged with burglary cannot be impeached with evidence of prior burglary if trial court does not conduct on-the-record probative hearing); *see also supra* notes 47-49 and accompanying text.

[96] *See supra* notes 30-33 and accompanying text.

[97] *See supra* notes 30-32 and accompanying text.

[98] *See supra* notes 34-44 and accompanying text.

[99] *See supra* notes 54-60, 77-80 and accompanying text.

[100] *See* Gordon v. United States, 283 F.2d 936, 940 (D.C. Cir. 1967); *see also supra* notes 23, 67 and accompanying text.

[101] *See supra* note 77 and accompanying text.

[102] *See supra* notes 54-60, 67-70 and accompanying text.

IV. CONCLUSION

The message the Mississippi Supreme Court sent with *Bogard* is a message to criminal defendants and trial courts alike: The trial courts wield broad power to determine the admissibility of a prior conviction regardless of the similarity between the prior conviction and the present charge. The trial courts can wield this power generally unfettered by contrary decisions of the Mississippi Supreme Court so long as the court respects the procedure for determining probative value of prior convictions. This focus on procedure rather than precedent has allowed the Mississippi courts to resurrect some of the common law notions of prior conviction admissibility which were seemingly abandoned with the creation of the Mississippi Rules of Evidence. Trial courts can admit similar prior convictions to impeach credibility so long as they find that this one factor in the balancing test is not too prejudicial. Given the recent decisions culminating in *Bogard*, it seems that the Supreme Court of Mississippi now believes that similar prior convictions are not as unfairly prejudicial as most courts believed in the years following *Gordon*. This has resulted in a dichotomized approach to prior conviction admissibility in Mississippi. The courts utilize a procedurally sound rule and balancing process, but the factors are considered in light of reemerging, pre-Rule 609 common law.

Rick A. Hammond

TORTS—PREMISES LIABILITY—THE "OPEN AND OBVIOUS" DEFENSE IS NO LONGER A COMPLETE BAR TO PLAINTIFF RECOVERY

Tony Tharp examined grain at the Bunge Corporation's [hereinafter Bunge] grain storage facility in Greenville, Mississippi as a business invitee.[1] Sometime prior to his arrival, an employee of Bunge placed a tarpaulin under the catwalk leading from the storage building to the levee barge loading facility.[2] Tharp, while exiting the catwalk, chose to jump rather than step down from the doorway leading from the catwalk to the ground below, caught his foot in the tarpaulin, and fell and injured his knee.[3] Tharp, along with his workers' compensation carrier,[4] sued Bunge and the employee for negligence in not providing an adequate exit from the catwalk.[5] Bunge denied any liability for itself or the employee and filed a counterclaim alleging that Bunge and three others conspired to convert and defraud.[6]

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[1] Tharp v. Bunge Corp., 641 So. 2d 20, 22 (Miss. 1994).

[2] *Tharp*, 641 So. 2d at 22. Tharp and Aubra Moody were employees of the Mississippi Department of Agriculture and routinely sampled or graded grain at Bunge's facility as independent entities to assure quality for buyers. *Id.* Bunge placed the tarpaulin under the catwalk to catch soybeans that fell off the conveyor. *Id.* The exact arrangement of the tarpaulin varied, but generally Bunge employees placed it under the catwalk in the morning and periodically emptied it during the day. *Id.* The height of the tarpaulin on September 17, 1984, the day of Tharp's accident, was in dispute. *Id.*

[3] *Id.* Bunge provided no steps or ladders to assist the grain samplers from getting from the catwalk door to the levee beneath. *Id.* The ground below the door sloped sharply and the drop varied from 29 to 39 inches depending on the side of the door exited. *Id.*

[4] *Id.* Tharp's workers' compensation carrier, United States Fidelity & Guaranty Company, intervened after it paid $39,758.20 in medical benefits. *Id.*

[5] *Id.* Tharp sued Bunge for negligently failing to provide a ladder or step to get from the levee to the catwalk and for placing a tarpaulin across the doorway. *Id.* Tharp also sued Bunge's employee, Poole Chapman. *Id.*

[6] *Id.* at 25-26. Bunge counterclaimed against Tharp and three others for

The Circuit Court of Washington County directed a verdict in favor of Bunge.[7] Upon Tharp's Motion for Reconsideration, the trial court ordered a new trial.[8] After the jury awarded damages in favor of Tharp, the court granted a Judgment Notwithstanding the Verdict in favor of Bunge.[9] On appeal, the Mississippi Supreme Court decided Tharp was negligent in confronting the "open and obvious" danger and barred his recovery.[10] On Petition for Rehearing the Mississippi Supreme Court, held: Reversed and remanded. The court held that where an open and obvious condition exists on the premises and the plaintiff suffers injuries as a result, the defendant does not have a complete defense and comparative negligence applies.[11]

I. RELATED LAW

A. Contributory and Comparative Negligence

Prior to its adoption of comparative negligence, Mississippi courts adhered to the doctrine of contributory negligence,[12]

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conspiracy to convert and defraud Bunge arising out of a plot to have false scale tickets given from Bunge's facility at Greenville. *Id.* In a separate trial, the trial judge refused to send the conversion claim to the jury and Bunge appealed. *Id.* at 26. On appeal, the Mississippi Supreme Court held that the trial judge had erred in withholding Bunge's conversion claim from the jury. *Id.*

[7] *Tharp*, 641 So. 2d at 23. Tharp's negligence claim went to trial on November 30, 1987 and the trial judge directed a verdict in favor of Bunge. *Id.*

[8] *Id.* Tharp filed a Motion for Reconsideration which the judge granted on October 26, 1989. *Id.*

[9] *Id.* The judge retried the case on May 14, 1990 and the jury decided in favor of Tharp, awarding him $113,828.00. *Id.* Bunge responded by filing a Motion for a New Trial or, alternatively, a Motion for a Judgment Notwithstanding the Verdict. *Id.* The trial court granted Bunge's Motion for a Judgment Notwithstanding the Verdict. *Id.*

[10] Tharp v. Bunge Corp., No. 90-CA-1160, slip op. at 9 (Miss. Sept. 2, 1993), *withdrawn on reh'g*, Tharp v. Bunge Corp., 641 So. 2d 20 (Miss. 1994). The court affirmed the trial court's granting of the Judgment Notwithstanding the Verdict. *Tharp*, No. 90-CA-1160, slip op. at 9.

[11] Tharp v. Bunge Corp., 641 So. 2d 20, 25 (Miss. 1994).

[12] Olger C. Twyner, III, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L.J. 563, 565 (1982). By 1909, all fifty states subscribed to the doctrine of contributory negligence. *Id.* Contributory negligence developed principally because neither liability insurance nor an effective accounting system existed

under which a plaintiff's negligence barred his recovery.[13] However, this negligence principle had such a harsh impact on plaintiffs' recovery[14] that exceptions developed to alleviate the rule's severity.[15] Comparative negligence replaced contributory negligence in 1910 as the forerunner to section 11-7-15 of the Mississippi Code.[16] Soon thereafter, the court decided in *Yazoo & Mississippi Valley Railroad v. Carroll*[17] that the statute did not introduce varying levels of contributory negligence, but instead created a diminution in a plaintiff's recovery according to his degree of fault.[18]

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to spread losses. William H. McMullen, Jr., Note, *Torts-Effect of Mississippi's Comparative Negligence Statute on Other Rules of Law*, 39 MISS. L.J. 493, 504 (1968).

[13] McMullen, *supra* note 12, at 504. "The rationale was that when both parties are to some degree at fault, the court should not disturb their relative positions but leave them where their joint negligence placed them." *Id.* at 495. This check and balance between the two supposedly deterred others from future negligent conduct. *Id.*

[14] Twyner, *supra* note 12, at 565. Under the doctrine of contributory negligence, a plaintiff could not recover even if he was only one percent at fault. *Id.* Courts generally saw the contributory negligence system as a mechanism to keep "plaintiff-minded" juries under control. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 207 (1990).

[15] Twyner, *supra* note 12, at 565. The "last clear chance" defense allowed negligent plaintiffs to escape contributory negligence if the defendant had the ability to avoid the accident after the plaintiff's negligent act. Christian v. Illinois C.R.R., 12 So. 710, 711 (Miss. 1893). Later, last clear chance lost "meaning and importance" when comparative negligence started weighing both parties' fault. Illinois C.R.R. v. Underwood, 235 F.2d 868, 878 (5th Cir. 1956), *cert. denied*, 352 U.S. 1001 (1957). Courts further assisted plaintiffs by sending cases to juries because juries tended to apply comparative negligence even when the judge gave contributory negligence instructions. Twyner, *supra* note 12, at 566. Also, some courts refused to apply the doctrine to gross negligence, intentional tort, or strict liability cases. *Id.*

[16] MISS. CODE ANN. § 11-7-15 (1972). Mississippi was the first state to adopt comparative negligence, now found at § 11-7-15 of the Mississippi Code. Twyner, *supra* note 12, at 568. Displeasure with the harshness of contributory negligence resulted in the transformation of 40 states to differing forms of comparative negligence by 1983. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 67, at 471 n.30 (5th ed. 1984).

[17] 60 So. 1013 (Miss. 1913).

[18] *Carroll*, 60 So. at 1014. The comparative negligence system first enunciated in § 11-7-15 of the Mississippi Code was a "pure" form of comparative negligence.

B. *The "Open and Obvious" Defense*

The duty business owners owe toward their invitees[19] is one of reasonable care to keep the premises of their businesses in a reasonably safe condition.[20] The "open and obvious" defense developed as an exception[21] to this duty[22] of care.[23] Under the exception, defendants escaped liability when the

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Twyner, *supra* note 12, at 568.

[19] *See, e.g.*, Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760, 763 (Miss. 1989) (arguing that church breached its duty as invitor when plaintiff slipped on wooden floor). Businessmen invited on the premises by occupiers fell within the common law class of invitees. *Clark*, 538 So. 2d at 763.

[20] Jerry Lee's Grocery, Inc. v. Thompson, 528 So. 2d 293, 295 (Miss. 1988). If there was an unreasonably dangerous condition on the premises that was not readily apparent to the invitee, the owner had a duty to warn the invitee of the danger. *Jerry Lee's Grocery*, 528 So. 2d at 295. Where the owner conformed to the reasonable care standard, he was not negligent even though another more careful action on his part would have avoided or lessened the danger. Caruso v. Picayune Pizza Hut, Inc., 598 So. 2d 770, 773 (Miss. 1992).

[21] James P. Costello, *Rulings Go Off the Deep End in Limiting Premises Liability*, CHI. DAILY L. BULL., October 15, 1993, at 6. The open and obvious rule embodies the term *volenti non fit injuria*. *Id.* The term means if you confronted a danger, you assumed the risk of a resulting injury. BLACK'S LAW DICTIONARY 1575 (6th ed. 1991).

[22] Costello, *supra* note 21, at 6. Common law landowner liability rested on the premise that the occupier of land enjoyed "quasi-sovereignty" over his land and that he should use it without restriction. *Id.* This standard rested not on reasonable care, but on self-dominion principles. *Id.*

[23] David J. Doll, Casenote, *The Demise of the Open and Obvious Rule in Illinois* Ward v. K-Mart, 136 Ill. 2d 132, 554 N.E.2d 223 (1990), 16 S. ILL. U. L.J. 179, 180 (1991). Several theories developed surrounding the basis for this exception. *Id.* One theory rested on the idea that a possessor of land had superior knowledge of the dangers of his property. Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 634 (1952). Another focused on providing an incentive to occupiers so that they would completely disclose the risks in coming on the property. James Fleming, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 627 (1954). The last theory was based on the idea that the open and obvious exception was necessary to promote laissez-faire use of the land. Barbara L. Lauer, Casenote, *Torts-Assumption of Risk and the Obvious Danger Rule, Primary or Secondary Assumption of Risk?*, 18 LAND & WATER L. REV. 373, 387 (1983). Mississippi cases appeared to focus on the superior knowledge theory. *See* Wilbourn v. Charleston Cooperage Co., 90 So. 9, 11 (Miss. 1921) (holding that if owner had knowledge that invitee did not have, owner had to inform invitee of risk). *But see* Daniel v. Jackson Infirmary, 163 So. 447, 448 (Miss. 1935) (arguing that there was no duty to warn if hazard was recognizable by reasonable person).

plaintiff negligently confronted an obvious danger created by the owner.[24]

The first Mississippi case to discuss this rule[25] was *Woodland Gin Co. v. Moore*.[26] In *Woodland Gin*, two wayward steers drowned in a gated pond when their owner neglected to protect them from a ditch surrounding the pond on the grounds of a gin house.[27] The court stated that if a condition such as the ditch was open and obvious, the defendant could not be negligent.[28] Later in *Wilbourn v. Charleston Coo-*

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[24] Lauer, *supra* note 23, at 374. Two assumption of risk theories explained how the open and obvious defense functioned: (1) under primary assumption of risk, the obvious danger negated the duty the landowner owed to the invitee, while (2) under secondary assumption of risk, the invitee's negligence was contributory negligence that barred his recovery. *Id.* Under contributory negligence, whether primary or secondary assumption of risk applied, the result was the same. *Id.* at 375. If the defendant owed the plaintiff no duty, the plaintiff could not recover when applying primary assumption of risk. *Id.* Likewise, if the plaintiff was contributorily negligent, the plaintiff could not recover when applying secondary assumption of risk. *Id.*

[25] RESTATEMENT (SECOND) OF TORTS § 340 (1934). Under the traditional rule of the Restatement (Second) of Torts § 340, a possessor's liability did not extend to harm caused by an open and obvious danger. Doll, *supra* note 23, at 180.

[26] 60 So. 574 (Miss. 1913).

[27] *Woodland Gin*, 60 So. at 575. Since the ditch was "entirely obvious" to "man or beast," the owner owed no duty to provide protection to his invitees from the condition. *Id.*

[28] *Id.* Business owners' liability increased after the adoption of comparative negligence and the open and obvious defense provided an exception to this greater accountability. Carl S. Hawkins, *Premises Liability After Repudiation of the Status Categories: Allocation of Judge and Jury Functions*, 1981 UTAH L. REV. 15, 16. Owners' liability increased due to social pressures that favored helping accident victims. *Id.* One proposal to help such victims was the trend to broaden the class of eligible plaintiffs by abolishing the common law classes of trespasser, licensee, and invitee. *Id.*; *see, e.g.,* Clarke v. Beckwith, 858 P.2d 293, 296 (Wyo. 1993) (applying reasonable care under circumstances and merging licensee into invitee category). In 1970, although the court found persuasive the argument to abandon the common law classification scheme, it decided the protection plaintiffs would gain would not counterbalance the problem in overruling precedent. Astleford v. Milner Enters., 233 So. 2d 524, 525 (Miss. 1970). The court wanted to preserve detailed case law and to avoid providing overly simplistic standards. Adams v. Fred's Dollar Store, 497 So. 2d 1097, 1102 (Miss. 1986); *see* Payne v. Rain Forest Nurseries, Inc., 540 So. 2d 35, 37 (Miss. 1989) (holding court adhered to familiar common law labels); Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 648 (Miss. 1988) (stating "since the world was young" Mississippi had adhered to common law class distinctions); Holley v. International Paper Co., 497

perage Co.,[29] the court held that even if a defendant created an "unsafe condition," if the plaintiff was also negligent, the plaintiff could not recover.[30] Repeatedly over the years, the court applied the rule from these cases that the open and obvious danger rule was an absolute defense.[31]

C. Open and Obvious and Comparative Negligence

At the inception of the open and obvious defense, the court did not discuss any possible conflict between open and obvious as a complete bar to recovery and comparative negligence.[32] The two theories' fundamental incongruity[33] became an issue, however, in succeeding decisions.[34] Under open and

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So. 2d 819, 821 (Miss. 1986) (holding legislatures best equipped to change classification scheme).

[29] 90 So. 9 (Miss. 1921).

[30] *Wilbourn*, 90 So. at 11. No liability resulted for owners when invitees confronted obvious dangers. *Id.* Owners were not the absolute insurers of the safety of their buildings and thus did not warrant the safety of obvious dangers. Daniel v. Jackson Infirmary, 163 So. 447, 448 (Miss. 1935). Only foreseeable harm imposed a duty to protect invitees. D'Antoni v. Albritton, 126 So. 836, 838 (Miss. 1930). No owner expected injuries to result from obvious dangers. *D'Antoni*, 126 So. at 838.

[31] General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 107 (Miss. 1969). No obligation existed to protect invitees from open and obvious dangers. *Id.*; *see* First Nat'l Bank v. Cutrer, 214 So. 2d 465, 466 (Miss. 1968) (holding since invitee chose to encounter danger, owner owed invitee no duty); Stanley v. Morgan & Lindsey, Inc., 203 So. 2d 473, 477 (Miss. 1967) (holding damages for injury from open and obvious danger not recoverable).

[32] Wallace v. J.C. Penney Co., 109 So. 2d 876, 877-78 (Miss. 1959). As early as 1959, the court recognized a "distinction" between assumption of risk, the open and obvious defense, and comparative negligence. *Wallace*, 109 So. 2d at 878.

[33] Satcher v. Honda Motor Co., 855 F. Supp. 886, 892-93 (S.D. Miss. 1994). The open and obvious rule for products liability has existed since 1962. Harrist v. Spencer-Harris Tool Co., 140 So. 2d 558, 561 (Miss. 1962). Under Mississippi's risk-utility test, obvious conditions were one factor for the court to consider in determining whether the product was unreasonably dangerous. Black v. J.I. Case Co., 22 F.3d 568, 573 (5th Cir. 1994). Effective July 1, 1994, § 11-1-63 of the Mississippi Code allows obvious dangers to be complete defense to products liability actions involving inadequately given warnings. MISS. CODE ANN. § 11-1-63 (Supp. 1993).

[34] Note, *Contributory Negligence and Assumption of Risk—A Case for their Merger*, 56 MINN. L. REV. 47, 53 (1971). From a policy viewpoint, it was unjustifiable to bar a plaintiff's recovery where he reasonably accepted the obvious dan-

obvious, a defendant primarily at fault could escape liability,[35] while under comparative negligence, apportionment of fault was the goal.[36] Reconciliation between comparative negligence and absolute defenses proved difficult and where possible, the court generally limited the applicability of complete barriers to recovery.[37]

In *Bell v. City of Bay St. Louis*,[38] the court began to question the open and obvious defense as an absolute barrier to a plaintiff's recovery.[39] The plaintiff in *Bell* slipped and fell

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ger. *Id.* at 57. Society should not force consumers into "either accepting the risks of unnecessarily dangerous services or doing without these services." W. Page Keeton, *Assumption of Risk and the Landowner*, 20 TEX. L. REV. 562, 563 (1942).

[35] Note, *supra* note 34, at 53. Where a defense completely barred a plaintiff's recovery, the defense weakened comparative negligence. *Id.*

[36] Twyner, *supra* note 12, at 566. Comparative negligence sought to replace the harsh result of negligent plaintiffs not being able to recover from negligent defendants. *Id.* Issues of negligence were for the jury to decide. Daniel M. Faber, Note, *Comparative Negligence and the Obvious Danger Rule*: Klopp v. Wackenhut Corp., 23 N.M. L. REV. 225, 235 (1993). In comparative negligence states, juries should apportion fault by comparing factors such as possibility to avoid danger, obscurity of danger, severity of foreseeable injuries, foreseeability of distraction, foreseeability of plaintiff, and the risk's unreasonableness. *Id.*

[37] Satcher v. Honda Motor Co., 758 F. Supp. 393, 395 (S.D. Miss. 1991), *aff'd on reh'g*, 855 F. Supp. 886 (S.D. Miss. 1994). For instance, where assumption of risk and comparative negligence overlapped, the court applied comparative negligence. Braswell v. Economy Supply Co., 281 So. 2d 669, 677 (Miss. 1973). Also, "[o]nly in rare circumstances" was the plaintiff's conduct extreme enough for the judge to consider an assumption of risk instruction. Yarbrough v. Phipps, 285 So. 2d 788, 790 (Miss. 1973). In 1986, the court recognized, but refused to accept, the national trend that assumption of risk was an "artificial" form of plaintiff negligence which should diminish plaintiff recovery according to comparative negligence. Hill v. Dunaway, 487 So. 2d 807, 810 n.1 (Miss. 1986). Later in a dissent, Justice Sullivan equated assumption of risk with comparative negligence. McDaniel v. Ritter, 556 So. 2d 303, 320 (Miss. 1989) (Sullivan, J., dissenting). Recently, the court appeared to be on the "brink" of abolishing assumption of risk altogether. *Satcher*, 758 F. Supp. at 395. Similarly, the excuse of "sudden emergency" met its demise in 1980 because the defense's complete bar tended "to confuse the principle of comparative negligence." Knapp v. Stanford, 392 So. 2d 196, 198-99 (Miss. 1980).

[38] 467 So. 2d. 657 (Miss. 1985).

[39] *Bell*, 467 So. 2d at 664. The Restatement (Second) of Torts also reconsidered the rule and decided to limit the open and obvious defense by replacing § 340, which was pro-landowner, with §§ 343 and 343A, which are pro-invitee. RESTATEMENT (SECOND) OF TORTS §§ 343, 343A (1965). The new version enlarged "a possessor's liability where he should anticipate the harm despite the entrant's

on grass and debris left on a sidewalk.[40] The court expressed concern with the idea that an injured plaintiff, such as the one in *Bell*, could not recover from a grossly negligent defendant solely because the plaintiff was also negligent.[41] The court concluded that "except [in] the clearest cases" where an owner conformed to his duty, issues of negligence were decisions for juries.[42]

After *Bell*'s moderate deviation from traditional application of the rule, the court, instead of building on its departure from the rule, repeated its support for the traditional interpretation of open and obvious in *Kroger, Inc. v. Ware*.[43] In its application of the open and obvious defense to an invitee's trip over a brightly-painted curb, the court stated that owners owed no duty to invitees where the danger was "known or obvious" to the invitee.[44] After this case, however, the court kept very few issues of negligence from the jury.[45]

After *Kroger*, the court regularly tried to move away from the open and obvious defense[46] as a complete bar.[47] For in-

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knowledge or the obviousness of the danger." Doll, *supra* note 23, at 182.

[40] *Bell*, 467 So. 2d at 659. The city denied any objects were present on the sidewalk or that a danger existed. *Id.*

[41] *Id.* at 664. As an example, the court stated that if a person parked his car in the middle of the street, under an extreme interpretation of open and obvious, plaintiffs injured as a result could not recover. *Id.*

[42] *Id.* The trial judge's instructions constituted reversible error because the jury could not return a verdict for the plaintiff if it considered her negligent. *Id.* at 665. The court condemned jury instructions that completely denied negligent plaintiffs recovery. *Id.* at 664; *see also* Bozeman v. Tucker, 203 So. 2d 795, 799 (Miss. 1967) (finding negligence as question for jury); Morgan v. Cunningham, 172 So. 2d 408, 411 (Miss. 1965) (same).

[43] 512 So. 2d 1281 (Miss. 1987), *overruled by* Tharp v. Bunge Corp., 641 So. 2d 20 (Miss. 1994).

[44] *Kroger*, 512 So. 2d at 1282. Some evidence must point toward the defendant's fault for jury to decide this issue. *Id.*

[45] *See, e.g.*, Jerry Lee's Grocery, Inc. v. Thompson, 528 So. 2d 293, 293-96 (Miss. 1988) (holding that no jury question existed because there was no evidence of negligence on part of store owner in "slip and fall" case). Since there was no evidence of negligence, no jury question existed. *Jerry Lee's Grocery*, 528 So. 2d at 295; *see* Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 648 (Miss. 1988) (holding no jury issue existed since store visitor slipped on obvious ice).

[46] Tharp v. Bunge Corp., No. 90-CA-1160, slip op. at 9, *withdrawn on reh'g*,

stance, in *Goodwin v. Derryberry Co.*,[48] a case involving a "slip and fall" on ice, the court discussed two lines of cases that either gave or kept issues of negligence from the jury.[49] The court concluded that if there was a question whether the occupier exercised reasonable care in maintaining his property, a jury should decide the landowner's fault.[50] *Goodwin* was a resonance of *Bell* in that the court sent most fault issues to

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641 So. 2d 20 (Miss. 1994). The court rejected a piecemeal approach to aiding plaintiffs by weakening the open and obvious defense with exceptions. *Tharp*, 1993 Miss. LEXIS 369, at *7 (opinion has since been withdrawn from LEXIS). Mississippi courts never cited the Restatement (Second) of Torts § 343A and its limiting exceptions to the open and obvious defense. *Id. But see* General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 107 (Miss. 1969) (utilizing exception of unreasonable risk of harm without referring to section 343A). Other states limited the defense without abolishing it entirely. Doll, *supra* note 23, at 182; *see, e.g.*, Klopp v. Wackenhut Corp., 824 P.2d 293, 300 (N.M. 1992) (denying use of obvious defense when plaintiff distracted).

[47] Biloxi Regional Med. Ctr. v. David, 555 So. 2d 53, 56 (Miss. 1989). Open and obvious conditions were never unequivocally open and obvious. *Biloxi Regional Med. Ctr.*, 555 So. 2d at 56. As such, juries always should decide to what degree an open and obvious condition existed unless faced with the "clearest of cases." *Id.*; *see* Foldes v. Hancock Bank, 554 So. 2d 319, 322 (Miss. 1989) (finding questionable issue of obviousness, court sent issue of obvious danger to jury); Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760, 764 (Miss. 1989) (holding genuine issue of owner negligence existed for jury to decide); McIntosh v. Deas, 501 So. 2d 367, 370 (Miss. 1987) (holding substantial evidence existed such that jury might find for defendant or for plaintiff).

[48] 553 So. 2d 40 (Miss. 1989).

[49] *Goodwin*, 553 So. 2d at 43. The court recognized a string of Mississippi cases that refused to give issues of negligence to the jury. *Id.*; *see, e.g.*, General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 107 (Miss. 1969) (discussing pinch by permanent elevator doors); Stanley v. Morgan & Lindsey, Inc., 203 So. 2d 473, 477 (Miss. 1967) (discussing trip on permanent sidewalk curb). Another line let the jury apportion fault. *Goodwin*, 553 So. 2d at 40. A sampling of these cases, like the other line of cases, yielded no determinable fact pattern. *Id.*; *see, e.g.*, Lancaster v. City of Clarksdale, 339 So. 2d 1359, 1361 (Miss. 1976) (discussing collision with permanent traffic box); King v. Dudley, 286 So. 2d 814, 816 (Miss. 1973) (discussing collision with temporary, but regularly hoisted, pulpwood); F.W. Woolworth Co. v. Stokes, 191 So. 2d 411, 418 (Miss. 1966) (discussing slip on rain puddle). The court never acknowledged any ascertainable reason why only some juries were allowed to decide issues of fault. *Goodwin*, 553 So. 2d at 43. After all, slip and fall cases appeared in both lines of cases, as did permanent and non-permanent dangers, and active and passive negligence. *Id.*

[50] *Goodwin*, 553 So. 2d at 43. The court tried to outline the roles of judge and jury in determining each party's fault for obvious dangers. *Id.* at 42-43.

the jury.

The court again moved toward the traditional use of the open and obvious defense one year later in *McGovern v. Scarborough*.[51] In *McGovern*, the court carefully delineated landowners' duties toward invitees.[52] Applying open and obvious to this case, the court held that an owner's duty did not include the razing of a three-quarter inch high threshold on which the invitee tripped.[53] In so doing, the court circumvented the jury by allowing trial courts to direct verdicts for overwhelmingly non-negligent owners.[54]

Continuing the line of reasoning established in *McGovern*, the court in the first hearing of *Tharp* denied the plaintiff recovery because he was negligent in confronting a dangerous doorway.[55] The dissent was important, however, because it formed the basis for the majority decision upon rehearing.[56] In the dissent, Justice McRae stated where open and obvious operated as a complete bar to recovery, it functioned as contributory negligence and directly conflicted with the state's comparative negligence rules.[57]

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[51] 566 So. 2d 1225 (Miss. 1990).

[52] *McGovern*, 566 So. 2d at 1228. The owner of the premises: (1) was "not an insurer of the invitee's safety," (2) had only a "duty to keep the premises reasonably safe," and (3) where "not reasonably safe to warn only where there [was] a hidden" dangerous condition. *Id.*

[53] *Id.*; *see* Johnson v. Boydston, 605 So. 2d 727, 729 (Miss. 1992) (holding jury question existed on landowner liability); Caruso v. Picayune Pizza Hut, Inc., 598 So. 2d 770, 773 (Miss. 1992) (holding jury should decide whether floor was reasonably safe); Munford, Inc. v. Fleming, 597 So. 2d 1282, 1284 (Miss. 1992) (holding jury should decide if businessman owed duty for obvious condition).

[54] *McGovern*, 566 So. 2d at 1228. In *McGovern*, the court found no evidence from which a jury could find the door entrance not reasonably safe. *Id.* In general, juries tend to favor victim recovery. Wex S. Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 74 (1945). Therefore, where only spare evidence of owner carelessness exists judges keep cases from juries. *Id.* at 75.

[55] Tharp v. Bunge Corp., No. 90-CA-1160, slip op. at 9 (Miss. Sept. 2, 1993), *withdrawn on reh'g*, Tharp v. Bunge Corp., 641 So. 2d 20 (Miss. 1994). The court reasoned that since Tharp appreciated the danger, he could not recover. *Id.*

[56] *Tharp*, No. 90-CA-1160, slip op. at 28 (McRae, J., dissenting). One year later, the court accepted the dissent's position and abolished the open and obvious defense. Tharp v. Bunge Corp., 641 So. 2d 20, 20 (Miss. 1994).

[57] *Tharp*, No. 90-CA-1160, slip op. at 3-4 (McRae, J., dissenting). Absolute de-

II. *THARP V. BUNGE CORP.*

A. Opinion of the Court

The Mississippi Supreme Court granted a Petition for Rehearing within one year of rendering its first opinion on *Tharp*.[58] After detailing the standard of review,[59] the court recounted the basic elements of negligence.[60] Next, the court reviewed Mississippi's long-standing adherence to the "pure" comparative negligence standard.[61] The court also recognized the tension between the defense of open and obvious danger and comparative negligence over the years.[62]

Under Mississippi law, the court stated there could be more than one proximate cause to a negligent act.[63] In the instant case, the court reasoned that if both the plaintiff and defendant were at fault, comparative negligence applied and the open and obvious standard became merely a "defense used to compare the negligence of the plaintiff to the negligence of the defendant."[64] Therefore, the court abolished the open and obvious danger rule where it operated as a complete defense.[65]

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fenses confused issues of reasonableness and apportionment of fault. *Id.* (McRae, J., dissenting).

[58] Tharp v. Bunge Corp., 641 So. 2d 20, 20 (Miss. 1994). The court rendered its first decision in *Tharp* on September 2, 1993. Tharp v. Bunge Corp., No. 90-CA-1160, slip op. at 9 (Miss. Sept. 2, 1993).

[59] *Tharp*, 641 So. 2d at 23. Only if there was insufficient evidence to support a verdict in favor of Tharp could the trial court have correctly granted Bunge's Motion for a Judgment Notwithstanding the Verdict. *Id.*

[60] *Id.* at 23-24. The court restated settled law that no plaintiff could recover against a defendant who was not negligent. *Id.* at 23.

[61] *Id.* Under § 11-7-15 of the Mississippi Code, a plaintiff's contributory negligence is not a bar to recovery; instead, the court will reduce damages in proportion to his degree of fault. *Id.*

[62] *Id.* Under open and obvious the plaintiff could not recover, while under comparative negligence the plaintiff's negligence results in a diminution of his recovery. *Id.*

[63] *Id.* at 24. Both the negligence of the defendant in creating the danger and of the plaintiff in encountering the danger could proximately cause an accident. *Id.*

[64] *Tharp*, 641 So. 2d at 24. The court recognized the trend of states to change open and obvious from a complete defense to a factor to be considered in comparative negligence. *Id.*

[65] *Id.* at 25. The court wanted to "discourage unreasonably dangerous condi-

The court rejected the trial court's determination that *McGovern v. Scarborough* controlled *Tharp*.[66] The court distinguished this case because the defendant in *McGovern*, unlike the one in *Tharp*, was not negligent.[67] The defendant in *McGovern* was not negligent because the entrance to his building was "reasonably safe."[68]

The court determined that dangerous conditions were no longer absolute bars to landowner or occupier liability.[69] After recognizing the jury's finding that the defendant was negligent, the court held that the trial judge erred when he granted a Judgment Notwithstanding the Verdict and replaced his ruling with the general verdict.[70]

B. Dissenting Opinion

Presiding Justice Prather, joined by Chief Justice Hawkins, Justice Roberts, and Justice Smith, dissented.[71] She reasoned that the long-standing precedent of open and obvious as a complete bar to recovery should stand.[72] She also disagreed with the majority's interpretation of the facts of the case because she stated no jury could find in the plaintiff's favor based on the facts presented.[73] Therefore, Presiding

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tions rather than fostering them in their obvious forms" and encourage defendants to alleviate dangerous conditions. *Id.*

[66] *Id.*; *see* McGovern v. Scarborough, 566 So. 2d 1225, 1228 (Miss. 1990) (holding defendant not negligent).

[67] *Tharp*, 641 So. 2d at 24. According to the jury, Bunge was negligent in its placement of the tarpaulin. *Id.*

[68] *Id.* at 25 (quoting *McGovern*, 566 So. 2d at 1228). The doorway threshold of the business premises on which McGovern tripped rose three-quarters of an inch above the sidewalk. *Id.* (citing *McGovern*, 566 So. 2d at 1228).

[69] *Id.* Open and obvious became one factor to consider in determining possible negligence of the plaintiff. *Id.* at 24.

[70] *Id.* at 22. The jury awarded Tharp $113,828.00 in damages from Bunge. *Id.* at 21.

[71] *Id.* at 27 (Prather, P.J., dissenting). The dissent would not have allowed Tharp to recover part of his damages from Bunge. *Id.* (Prather, P.J., dissenting).

[72] *Tharp*, 641 So. 2d at 27 (Prather, P.J., dissenting). The dissent reasoned that in light of existing law, the majority's decision should only apply prospectively and not in the instant case. *Id.* (Prather, P.J., dissenting).

[73] *Id.* at 29 (Prather, P.J., dissenting). Justice Prather compared the fact situation in *Tharp* to other cases and found the condition of the premises within the

Justice Prather argued that the court should allow the Judgment Notwithstanding the Verdict to stand.[74]

III. Discussion

A. Compatibility

The goal of comparative negligence is to apportion damages according to fault.[75] Where the open and obvious defense operates as a complete defense, however, it cannot function under a comparative negligence doctrine.[76] Considering Mississippi's long history of operating under the comparative negligence doctrine,[77] the court should eliminate lingering contributory negligence exceptions in order to promote uniformity.[78]

The open and obvious defense functions as an exception to the duties all landowners owe to their visitors; it excuses deviation from reasonable care in the interest of protecting self-determination over land.[79] Although owners' interests are

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exception to reasonable care. *Id.* at 28-29 (Prather, P.J., dissenting). After detailing Tharp's testimony, Justice Prather decided the exit door was not unreasonably dangerous and therefore the defendant owed no duty to his invitee. *Id.* (Prather, P.J., dissenting).

[74] *Id.* at 27 (Prather, P.J., dissenting). Justice Prather stated that the trial judge had correctly granted the Judgment Notwithstanding the Verdict. *Id.* (Prather, P.J., dissenting).

[75] *Tharp*, 641 So. 2d at 24. Mississippi eliminates the defense of contributory negligence and enables plaintiff recovery according to his degree of fault. Twyner, *supra* note 12, at 563; *see supra* note 16 and accompanying text.

[76] *Tharp*, 641 So. 2d at 24. The open and obvious defense cannot function as a complete bar and remain consistent with comparative negligence. *Id.* at 25. The obviousness of a danger is one factor in determining the degree of fault. *Id.*; *see supra* note 36 and accompanying text.

[77] McMullen, *supra* note 12, at 493. In 1910, the Mississippi Legislature enacted comparative negligence. *Id.* Originally, the adoption of comparative negligence warded off the enactment of workers' compensation. *Id.* at 498. Since that time however, the pro-plaintiff climate has led to the enactment of that legislation as well. *Id.*; *see supra* note 16 and accompanying text.

[78] Knapp v. Stanford, 392 So. 2d 196, 199 (Miss. 1980). In order to systematically decide negligence cases, the court must apply uniform standards. *Knapp*, 396 So. 2d at 199. The court should consistently apply comparative negligence in every negligence case. *Id.* at 198; *see supra* note 37 and accompanying text.

[79] Costello, *supra* note 21, at 6. The open and obvious defense departs from

important in Mississippi,[80] the court has acted as the facilitator for victims' recoupment of their losses.[81] In *Tharp*, after years of wavering between weakening the defense to help plaintiffs recover and maintaining a safe haven for businessmen, the court finally chose in favor of plaintiffs.[82] The court reasoned that it was anomalous to require a landowner to exercise reasonable care in the maintenance of his property, but then to deny victims recovery for accidents resulting from breaches of this duty.[83]

B. Protection of Plaintiffs

After *Tharp*, plaintiffs have a higher likelihood of receiving compensation for their losses.[84] On its face, the decision appears to aid plaintiffs while not punishing defendants for more than their degree of fault.[85] After all, in theory, a defendant only one percent responsible for an accident need only pay one per cent of the plaintiff's damages.[86] In reality, however, defendants' duties will considerably increase.[87] Business

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the standard of reasonable care. *Id.* Landowners' dominion over their property is paramount to the development of the open and obvious exception to the reasonable care standard. *Id.*; *see supra* note 22 and accompanying text.

[80] Daniel v. Jackson Infirmary, 163 So. 447, 448 (Miss. 1935). Owners are not the unqualified insurers of safety of their buildings. *Daniel*, 163 So. at 448; *see supra* note 30 and accompanying text.

[81] Twyner, *supra* note 12, at 565. The court wants plaintiffs to be reimbursed for their losses and generally to avoid absolute barriers to damage recovery. *Id.*; *see supra* notes 34-36 and accompanying text.

[82] *Tharp*, 641 So. 2d at 25. From now on, the open and obvious defense is not a complete bar, but instead mitigates plaintiffs' damages under comparative negligence. *Id.*; *see supra* notes 62-64 and accompanying text.

[83] *Tharp*, 641 So. 2d at 25. The party who occupies the property is in the best position to repair it and is therefore responsible for alleviating dangerous conditions. *Id.*; *see also supra* note 22 and accompanying text.

[84] *Tharp*, 641 So. 2d at 25. For instance, Tharp now recovers a portion of his damages according to his degree of fault. *Id.* There is no longer an absolute bar to his recovery. *Id.*; *see supra* notes 16-18 and accompanying text.

[85] Twyner, *supra* note 12, at 568. A plaintiff recovers up to his percentage or degree of fault. *Id.*; *see supra* notes 16-18 and accompanying text.

[86] *Tharp*, 641 So. 2d at 24. Theoretically, if a plaintiff is ninety-nine percent at fault, he still qualifies for one percent of the damages the defendant caused him. *Id.*; *see supra* notes 16-18 and accompanying text.

[87] Doll, *supra* note 23, at 196. Abolishing the open and obvious defense with-

owners will have significant expenditures eliminating borderline dangerous conditions and will have to reimburse more plaintiffs as victim-friendly juries are able to apportion fault from open and obvious accidents.[88] Further, insurance rates will possibly skyrocket as more lawsuits, and perhaps more victories, deplete insurance company profits.[89]

The rising popularity of tort reform may cause legislatures to supersede plaintiff-oriented case law in order to provide some refuge for defendants.[90] Tort reform emphasizes the need to deflate ballooning insurance rates and control unlimited joint and several liability.[91] Recently, the Mississippi Legislature reinstated the open and obvious defense for products liability after the courts chipped away at it.[92] Per-

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out properly limiting owner liability imposes an extremely broad duty on defendants. *Id.* at 192. Despite benefits to plaintiffs, the court should not destroy the defense but instead, should confine the rule to carefully delineated fact situations. *Id.* at 196.

[88] Goodwin v. Derryberry Co., 553 So. 2d 40, 44 (Miss. 1989) (Hawkins, C.J., dissenting). In abrogating the open and obvious defense, the court creates an "impossible burden" for property owners. *Goodwin*, 553 So. 2d at 44 (Hawkins, C.J., dissenting). For instance, where an ice storm makes a walkway slick, the owner cannot possibly scrape or salt enough to eliminate a jury question on his fault. *Id.* (Hawkins, C.J., dissenting). Along the same line, a "large force of moppers" cannot stop every rain drop. *See* Wallace v. J.C. Penney Co., 109 So. 2d 876, 880 (Miss. 1959). After the abrogation of the complete obvious defense, almost every open and obvious case goes to a jury. *Goodwin*, 553 So. 2d at 44 (Hawkins, C.J., dissenting). Many businesses may be forced to close under these financial pressures. *Id.* (Hawkins, C.J., dissenting); *see supra* note 32 and accompanying text.

[89] Doll, *supra* note 23, at 194. The consumer ultimately pays for the retailer's increased safety and insurance costs. *Id.*; *see also supra* note 55 and accompanying text.

[90] Satcher v. Honda Motor Co., 855 F. Supp. 886, 889 (S.D. Miss. 1994). In the products liability field, for instance, the Mississippi Legislature has reinstated the open and obvious defense after the courts had limited it. *Satcher*, 855 F. Supp. at 890-91; *see supra* note 33 and accompanying text.

[91] Mutter, *supra* note 14, at 205. The tort reform movement results from the crisis in insurance rates and attacks on deep pocket defendants who are only minimally responsible. *Id.* at 203. The proponents of tort reform are generally large companies, principally within the insurance and medical fields. *Id.*

[92] Satcher, 855 F. Supp. at 890-91. The statute allows manufacturers to use the obvious rule as a complete defense in some situations. MISS. CODE ANN. § 11-1-63 (Supp. 1994); *see supra* note 33 and accompanying text.

haps a similar legislative reinstatement of the defense for premises liability will soon follow.[93]

IV. CONCLUSION

The Mississippi Supreme Court in the *Tharp* decision took another step in the state's long march towards a plaintiff-focused legal system. After years of trying to preserve the traditional exception while still providing recovery for plaintiffs, the court created a direct collision between it and comparative negligence where before the doctrines had co-existed. Absent legislative intervention, the court's pro-plaintiff position may continue into other areas of the law.

Sara Falkinham

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[93] Holley v. International Paper Co., 497 So. 2d 819, 821 (Miss. 1986). Legislatures are in the best position to change traditional common law. *Holley*, 497 So. 2d at 821; *see supra* note 28 and accompanying text.

EMPLOYMENT LAW—EXCEPTIONS TO THE AT-WILL DOCTRINE—THE ADOPTION OF THE PUBLIC POLICY EXCEPTION IN TWO SPECIFIC SITUATIONS COULD SIGNAL THE ADOPTION OF ADDITIONAL EXCEPTIONS TO THE DOCTRINE

On October 17, 1988, James McArn signed an employment contract with Allied Bruce-Terminix Company to work at the company's facility in Columbus, Mississippi.[1] In March 1989, David Howell became the branch manager of the facility where McArn worked.[2] In May 1989, Howell fired McArn the day after McArn called John Headley, the company quality control man, to complain about working conditions.[3]

The parties differed as to why Howell discharged McArn.[4] McArn claimed that Howell discharged him because he reported illegal acts of the company.[5] The illegal acts consisted of the falsification of reports to the State Agricultural Department and lying to customers about their termite treatment.[6]

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[1] McArn v. Allied Bruce-Terminix Co., 626 So. 2d 603, 604 (Miss. 1993). The contract terms allowed either party to terminate employment at any time, with or without cause. *McArn*, 626 So. 2d at 604.

[2] *McArn*, 626 So. 2d at 604. As instructed by the company, McArn took Howell around the facility when Howell began work at the facility. *Id.*

[3] *Id.* at 605. McArn claimed that Howell fired him not only for complaining about working conditions but also for reporting the company for lying to customers about their termite treatment. *Id.* Contrary to McArn's statements, Howell contended that he only wanted to discuss the call to Headley with McArn and had no intention of firing McArn until McArn called him a "no good son of a bitch." *Id.* At trial Headley stated that he remembered McArn's complaint that employees were overworked and in a deposition he recalled McArn's complaint that the company lied to customers. *Id.*

[4] *Id.* at 604-05.

[5] *Id.* at 606. McArn claimed that he was not fired for the reasons contended by Howell. *Id.* at 604-05. He asserted that Howell wrote only one disciplinary action report for a bad attitude, which happened to be five days before his termination, and reprimanded him once for tardiness. *Id.* at 605.

[6] *Id.* On some assignments, such as the treatment of the New Home Building

Contrary to McArn's claims, Howell contended that he terminated McArn for other valid reasons.[7] Howell claimed that he never forced McArn to falsify paperwork submitted to the state; however, he admitted telling McArn to "make do" with the chemicals he had.[8] Witness testimony supported McArn's statements.[9]

After Howell fired McArn, McArn sued Allied Bruce-Terminix for wrongful discharge.[10] At trial, the circuit court

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Supply Store, McArn alleged that Howell forced him to tell the customer that McArn and Howell completed the treatment of the store even though they had not. *Id.* Also, McArn alleged that Howell did not supply him with enough chemicals to properly treat facilities. *Id.*

[7] *McArn*, 626 So. 2d at 604-05. Howell claimed that he wrote two citations to McArn: one for McArn's personal appearance, attitude, tardiness, and job performance, and another for McArn's insubordinate attitude. *Id.* "At trial, Howell testified that McArn's personal appearance did not meet the requirements of corporate policy and that his equipment was dirty." *Id.* at 604. Also, Howell asserted that he reported McArn to David Poole, the regional manager, after the second citation but that Poole asked him "not to give up on McArn." *Id.* at 605.

[8] *Id.* Howell denied telling McArn to lie to the New Home Building customer about their treatment. *Id.* However, a few days after McArn informed New Home Building Store of the improper treatment, Howell offered to re-treat the store. *Id.*

[9] *Id.* at 605-06. Bobby Joe Jones, the manager of New Home Building Store, testified that about one week after Allied Bruce-Terminix treated his store, McArn disclosed to him that the treatment was inadequate and suggested that the state inspect the work. *Id.* at 605. Furthermore, Jones commented that Howell lied to him about the completion of another portion of the job concerning the installation of jacks under the foundation. *Id.* Jim Haskins, a Department of Agriculture supervisor, confirmed the veracity of McArn's testimony in concluding that Allied Bruce-Terminix failed to adequately treat the New Home Building Supply Store. *Id.* Haskins also testified that McArn informed him of other jobs improperly performed by Allied Bruce-Terminix. *Id.* at 605. Investigations into two of the jobs showed that these treatments, like the treatment to the New Home Building Store, were similarly inadequate. *Id.* Moreover, Poole testified that Howell told him that McArn had a bad attitude, but Poole also stated that Howell lied to him concerning the adequacy of the treatments performed. *Id.* at 605-06. He further testified that he was unaware of McArn's claim that Howell provided an inadequate supply of chemicals. *Id.* at 606. Finally, Headley testified that McArn was a "good employee with an impressive work record" even though he did keep his truck dirty. *Id.* at 605. For further discussion of Headley's testimony, see *supra* note 3 and accompanying text.

[10] *Id.* at 604. McArn based his claim of wrongful discharge on the contention that Howell discharged him for reporting conduct that constituted crimes under Mississippi law. *Id.* at 606. McArn claimed that the company violated § 97-19-39 of the Mississippi Code, which pertains to the commitment of a felony when re-

granted the defendant's motion for a directed verdict based on the employment-at-will defense.[11] On appeal to the Mississippi Supreme Court, held: Reversed and remanded. The court held that an employee may seek damages based on a tort action of wrongful discharge when an employer has discharged him either for refusing to participate in an illegal act or for reporting the illegal acts of the employer.[12]

I. RELATED LAW

A. Historical Development of the Employment-at-Will Doctrine

The common law employment-at-will doctrine meant that either party in an indefinite employment contract could terminate the relationship for any reason and at any time.[13] Thus, under this doctrine, an employer incurred no liability for ter-

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ceiving money under false pretenses, and § 69-23-19 of the Mississippi Code, which states that violating state pest control regulations constitutes a misdemeanor. *Id.* (citing MISS. CODE ANN. §§ 97-19-39 and 69-23-19 (1972)).

[11] *Id.* at 604. The trial judge ruled that the facts of the case did not warrant the adoption of the public policy exception to the at will doctrine. *Id.* at 606.

[12] *McArn*, 626 So. 2d at 607. However, the court left "for another day the question of whether or not such conduct by the employer, if found, is in bad faith or an independent tort giving rise to punitive damages." *Id.* at 608. In addition, the court remanded the case to ascertain whether Howell terminated McArn for reporting illegal acts, thereby falling within the public policy exception. *Id.* at 607.

[13] *See* Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874 (Miss. 1981) (stating that "employee can quit at will; employer can terminate at will"); Montgomery Ward & Co. v. Skinner, 25 So. 2d 572, 576 (Miss. 1946) (commenting that employer could terminate at will); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983) [hereinafter *Protecting Employees*] (commenting that employer could terminate at will); *see also* RESTATEMENT (SECOND) OF AGENCY § 442 (1958) (stating that "obligations to employ and to serve . . . are terminable upon notice"); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484-85 (1976) (stating that basis of doctrine was concept of mutuality of obligations where "if the employee is free to quit at any time, then the employer must be free to dismiss at any time"); *cf.* Robinson v. Coastal Family Health Ctr., Inc., 756 F. Supp. 958, 960-61 (S.D. Miss. 1990) (holding that at will doctrine was not applicable to employee hired for fixed term, so employee could sue for breach of contract).

minating an employee, even if the reason for the termination was ill-founded or non-existent.[14] Since the doctrine's inception[15] it has been "the general rule for employment contracts of an indefinite duration" in a majority of the jurisdictions.[16]

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[14] Weyman W. McCranie, Jr., Comment, *The Unfairness of Federal Preemption of State Law Exceptions to the Employment-at-Will Rule and the Need for a Uniform National Remedy for Wrongful Discharge*, 55 MISS. L.J. 517, 518 & n.11 (1985); *see* Watkins v. United Parcel Serv., Inc., 797 F. Supp. 1349, 1357 (S.D. Miss. 1992) (ruling that employer could terminate employee for any reason because contract was indefinite); Oliver v. Forrest County Gen. Hosp., 785 F. Supp. 590, 594 (S.D. Miss. 1991) (ruling that hospital owed no obligation to discharged nurse prior to termination); Samples v. Hall of Mississippi, Inc., 673 F. Supp. 1413, 1416 (N.D. Miss. 1987) (holding that employer could discharge for any reason because employee was at will). *See generally* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06 (1967) (discussing employer's power over employee due to employment at will doctrine); Gary E. Murg & Clifford Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329, 329 (1982) (noting that doctrine meant that employer could dismiss employee for "no cause, good cause, or even bad cause").

Initially, the American courts borrowed the English rule where the parties presumed that the term of an indefinite employment contract was for one year and that termination was possible only if just cause existed. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976); *see also Protecting Employees*, *supra* note 13, at 1933 & n.14.

With the advent of the Industrial Revolution in the late 1800s, the American courts deviated from the English rule and developed a new rule for determining the duration of an indefinite employment contract. *See* Kathleen T. McCormick, *Wrongful Discharge of Private Employees in Texas: Status Quo or Statute?*, 19 T. MARSHALL L. REV. 45, 49 (1993) (stating that "[t]he position of the American courts changed . . . during the industrial revolution when laissez-faire economics and freedom of contract required . . . employers and employees [to] have greater freedom in the working relationship"); Charles A. Brake, Jr., Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 206-10 (1982) (tracing development of at will rule).

[15] HORACE G. WOOD, TREATISE ON THE LAW OF MASTER AND SERVANT § 1134, at 272-73 (1877). Many scholars have criticized the doctrine by commenting that the sources upon which Wood relied did not support his theory. *See, e.g.*, J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 & nn.53-54 (1974); *Protecting Employees*, *supra* note 13, at 1933 & n.15.

[16] Laurie A. Erdman, Casenote, *Gantt v. Sentry Insurance: When Can an Employee be Discharged? Ask the Legislature*, 25 PAC. L.J. 107, 118 & n.68 (1993). The first court to adopt the employment-at-will doctrine was the Pennsylvania Supreme Court. McCranie, *supra* note 14, at 518 n.11 (citing Henry v. Pittsburgh & L.E.R. Co., 21 A. 157, 157 (Pa. 1877)).

Since 1858, Mississippi has adhered to this doctrine in the area of torts.[17]

B. Steadfastness to the Employment-at-Will Doctrine

In *Kelly v. Mississippi Valley Gas Co.*,[18] the Mississippi Supreme Court did not modify the common law employment-at-will rule to allow a public policy exception to the rule.[19] In *Kelly*, an employee sued his employer for wrongful discharge because his employer fired him for filing a workmen's compensation claim.[20] The court noted that Mississippi adhered to the common law employment-at-will doctrine.[21] While the court recognized the harshness of the employment-at-will doctrine,[22] it stated that only the Mississippi Legislature

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[17] Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1087 (Miss. 1987). Mississippi adopted the doctrine in Butler v. Smith & Tharpe, 35 Miss. 457, 464 (1858). The *Butler* court commented "that an agency to do particular services from time to time, to be paid for as the services are rendered, and without any agreement as to the time of its continuance, is determinable at the pleasure of either party." *Butler*, 35 Miss. at 464.

[18] 397 So. 2d 874 (Miss. 1981).

[19] *Kelly*, 397 So. 2d at 877. Accordingly, the court declined to create a tort action for an employee discharged for filing a workmen's compensation claim. *Id.*

[20] *Id.* at 874. An increasing number of jurisdictions have created laws to protect employees from discharge for exercising a statutory right or privilege, such as filing a workmen's compensation claim. *Protecting Employees*, *supra* note 13, at 1937 & n.53. Also, many states have created laws to protect employees discharged for performing a public obligation, such as jury duty; for refusing to participate in an employer's illegal acts; or for refusing to violate a professional code of ethics. *Id.* at 1937 & nn. 49-52.

[21] *Kelly*, 397 So. 2d at 874. "This means either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract." *Id.* at 874-75 (citing Montgomery Ward v. Skinner, 25 So. 2d 572, 576 (Miss. 1946)).

[22] *Id.* at 875-76. The court reviewed the public policy exception to the at-will doctrine adopted by other states and quoted the Illinois Supreme Court as stating:

> We cannot ignore the fact that when faced with such a dilemma many employees, whose common law rights have been supplanted by the [Workmen's Compensation] Act, would choose to retain their jobs, and thus, in effect, would be left without a remedy either common law or statutory. This result, which effectively relieves the employer of the responsibility expressly placed upon him by the legislature, is untenable and is contrary to the public policy as expressed in the Workmen's Com-

could modify the Mississippi Workmen's Compensation Statute to provide a civil remedy for an employee dismissed for filing a workmen's compensation claim.[23] To do otherwise would encroach upon the powers of the Legislature.[24] Thus, given these reasons, the court refused to adopt the public policy exception.[25]

C. Interest in the Creation of an Exception to the Employment-at-Will Doctrine

In *Shaw v. Burchfield*,[26] the court expressed an interest

> pensation Act. We cannot believe that the legislature, even in the absence of an explicit proscription against retaliatory discharge, intended such a result.

Id. at 876 (quoting Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978)).

[23] *Id.* at 876-77. The court based its conclusion on the fact that some jurisdictions judicially refused to alter remedies provided by statute because only the legislature had the power to alter statutory provisions. *Id.* at 876. *But cf.* Niesent v. Homestake Mining Co., 505 N.W.2d 781, 784 (S.D. 1993) (Miller, C.J., concurring) (commenting that Mississippi and New Mexico were only two states which refused to judicially acknowledge cause of action for wrongful discharge for filing workmen's compensation claim and whose state legislatures have still refused to create statutory cause of action).

[24] *Kelly*, 397 So. 2d at 877. The court noted and reproduced a Texas statute providing a civil action for employees discharged for filing a workmen's compensation claim. *Id.* Furthermore, the court reviewed other states that had legislatively adopted public policy exceptions to the at will doctrine. *Id.* at 875.

One author has suggested that Mississippi statutory and constitutional provisions could provide a possible remedy for discharged employees. McCranie, *supra* note 14, at 523-24 n.32 (citing MISS. CONST. art. VII, § 191 and MISS. CODE ANN. § 79-1-9 (1972)).

[25] *Kelly*, 397 So. 2d at 877; *see also* Green v. Amerada-Hess Corp., 612 F.2d 212, 214 (5th Cir.) (applying Mississippi law, court disallowed claim based on termination due to employee's filing of workmen's compensation claim), *cert. denied*, 449 U.S. 952 (1980); Watkins v. United Parcel Serv., Inc., 797 F. Supp. 1349 (S.D. Miss.) (declining to create public policy exception to at will doctrine), *aff'd*, 979 F.2d 1535 (5th Cir. 1992); Oliver v. Forrest County Gen. Hosp., 785 F. Supp. 590, 594 (S.D. Miss. 1991) (adhering to Mississippi's rule of employment-at-will). *But see* Laws v. Aetna Fin. Co., 667 F. Supp. 342, 345-46 (N.D. Miss. 1987) (allowing public policy exception in application of Mississippi law, court held that *Kelly* governed only when issue of statutory alteration existed and that Mississippi Supreme Court would adopt public policy exception given opportunity).

[26] 481 So. 2d 247 (Miss. 1985).

in altering the common law employment-at-will rule.[27] In *Shaw*, the employee sued his employers for breach of contract[28] after his employers discharged him without cause.[29] While assessing the merits of the plaintiff's contract claim,[30] the court also commented on the increasing criticism aimed at the at-will doctrine.[31] The court noted that some exceptions to the at-will doctrine existed in situations where the reasons for termination were "independently declared legally impermissible."[32] The court suggested that it would allow an exception to the at-will rule in situations where no employment contract existed and the state is called upon to determine permissible grounds for termination.[33] However, since the con-

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[27] *Shaw*, 481 So. 2d at 254.

[28] *Id.* at 251. The plaintiff's other theories of liability included "[i]ntentional interference with existing contracts and prospective contractual relations" and "[c]onspiracy to involuntarily deprive Shaw of his position as agency manager and to deprive him of his business properties." *Id.*

[29] *Id.* The plaintiff contracted to work as the agency manager for three insurance companies. *Id.* at 249. After twenty-six years of service, the three companies dismissed the plaintiff on ten days notice with no reason given. *Id.* The plaintiff based his breach of contract suit on the employment contracts with the defendants. *Id.* at 249-51.

[30] *Id.* at 252-53. The terms of Shaw's contracts with the defendants expressly stated that either party could terminate the relationship on ten days notice without giving cause. *Id.* at 250. Given the clear and unambiguous language of the contract, the court concluded that it could not alter the terms of the contract. *Id.* at 252. Rather, the court reasoned that the employee had entered into an improvident bargain which it did not have the authority to modify. *Id.* at 249; *see also* Rosen v. Gulf Shores, Inc., 610 So. 2d 366, 368 (Miss. 1992) (stating that language in employment contract was most accurate method of ascertaining intent of parties and best manner in determining contract provisions); Pfisterer v. Noble, 320 So. 2d 383, 384 (Miss. 1975) (declaring that when written instrument was clear, explicit, and unambiguous, then court would look solely to language in instrument itself).

[31] *Shaw*, 481 So. 2d at 253-54. The court noted that it may no longer remain callous to the "fact that the impact of termination upon the employee is in general more adverse in a way that is qualitatively different than what the employer experiences when it is the employee who walks off the job." *Id.* at 254.

[32] *Id.*; *see* Mississippi Employment Sec. Comm'n v. Philadelphia Mun. Separate Sch. Dist., 437 So. 2d 388, 397 (Miss. 1983) (holding that school administration may refuse to rehire teacher for any reason except unconstitutional one).

[33] *Shaw*, 481 So. 2d at 254; *see* Laws v. Aetna Fin. Co., 667 F. Supp. 342, 346 (N.D. Miss. 1987) (interpreting *Shaw* as signal that Mississippi Supreme Court would amend "harsh and unequivocal nature" of at-will rule if suitable case

tract in this case expressly provided the grounds for termination, the court concluded that reconsideration of the at-will doctrine would wait until another day.[34]

D. Willingness to Adopt a Public Policy Exception Given the Appropriate Set of Facts

In *Perry v. Sears, Roebuck & Co.*,[35] the court indicated that it would modify the employment-at-will doctrine in Mississippi given the appropriate opportunity.[36] In *Perry*, the plaintiff pursued a breach of contract claim and a tort claim of wrongful discharge after his employer terminated him for no apparent reason.[37] In the plaintiff's tort claim of wrongful

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existed).

[34] *Shaw*, 481 So. 2d at 254; *see also* Samples v. Hall of Miss., Inc., 673 F. Supp. 1413, 1418-19 (N.D. Miss. 1987) (holding that express provisions governed interpretation of contract and that policy manual did not alter contract from at-will to one of duration).

[35] 508 So. 2d 1086 (Miss. 1987).

[36] *Perry*, 508 So. 2d at 1089-90. In *Perry*, the employer terminated the employee, who had worked for the company for about twenty years, without cause. *Id.* at 1087.

[37] *Id.* No written employment contract existed detailing the length of the plaintiff's employment. *Id.* at 1088. However, the plaintiff maintained that an implied contract existed forbidding the defendant from terminating him without cause. *Id.* He contended that the company's policy manual created contractual obligations for the defendant. *Id.* Although the court noted that certain Mississippi cases held that a policy manual had the effect of modifying the written contract, it rejected the plaintiff's argument because the policy manual in question expressly stated that the manual in no way created rights for the plaintiff to be retained or discharged only for cause. *Id.*

Mississippi has recognized several contract-based causes of action challenging dismissal of at-will employees. *See, e.g.*, Hartle v. Packard Elec., 626 So. 2d 106, 109-10 (Miss. 1993) (noting that independent consideration could modify at-will employment relationship so that employee could only be fired for cause; however, "good faith" provision of Mississippi Uniform Commercial Code did not apply to employment contracts); Coleman v. Chevron Pascagoula Fed. Credit Union, 616 So. 2d 310, 311 (Miss. 1993) (following rule that employer must adhere to manual in disciplining and discharging employees); Bobbitt v. The Orchard, Ltd., 603 So. 2d 356, 357 (Miss. 1992) (holding that plaintiff had valid breach of contract claim because employer who distributed policy manuals outlining termination procedures must adhere to procedures since employment contract stated nothing to contrary). *See generally* William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 214-25, 245-54 (1985) (discussing claim

discharge, the court assessed the two theories of liability asserted: the breach of good faith and fair dealing and the public policy exception to the at-will doctrine.[38] As to the first theory of liability, the court stated that the notion of an implied covenant of good faith and fair dealing constituted the basis of most tort claims for wrongful discharge.[39] The court declined to adopt the tort of wrongful discharge based on the implied covenant of good faith and fair dealing.[40] Furthermore, the court reviewed the public policy exception to the employment-at-will doctrine, noting the three broad categories of exceptions adopted by other jurisdictions.[41] Applying these public

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of wrongful discharge based on either implied-in-fact contract or covenant of good faith and fair dealing); Brian F. Berger, Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 161-67 (1981) (examining various contract exceptions to employment-at-will doctrine); McCranie, *supra* note 14, at 519-20 & nn.15-16 (stating that two types of contract claims acted as exceptions to at-will doctrine).

[38] *Perry*, 508 So. 2d at 1089-90. *See generally* Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816-28 (1980); Mauk, *supra* note 37, at 207-51.

[39] *Perry*, 508 So. 2d at 1089. The court elaborated that a tort cause of action of wrongful discharge was a hybrid theory grounded in contract and tort. *Id.* However, the most prominent hybrid hinged upon the implied covenant of good faith and fair dealing giving rise to a tort action upon breach of the covenant. *Id.* The court cited several cases to support its holding. *Id.* (citing Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1251 (Mass. 1977) and Monge v. Beebe Rubber Co., 316 A.2d 549, 549 (N.H. 1974), *modified*, Howard v. Dorr Woolen Co., 414 A.2d 1273, 1273 (N.H. 1980)). However, using the same cases cited in *Perry*, several scholars have treated the implied covenant of good faith and fair dealing as a contract claim rather than as a tort claim. McCranie, *supra* note 14, at 519-21; *Protecting Employees*, *supra* note 13, at 1935-36 .

[40] *Perry*, 508 So. 2d at 1089. The court reasoned that only a small minority of states had adopted a tort of wrongful discharge based on the implied covenant of good faith and fair dealing. *Id.* Additionally, the court commented, this particular case would not have prevailed under the doctrine even had the court adopted the cause of action. *Id.* However, the concurrence indicated interest in the application of the covenant of good faith and fair dealing to employment contracts but recognized that the imposition of this duty on the employment relationship could actually have a negative economic impact on both parties. *Id.* at 1090 (Robertson, J., concurring).

[41] *Id.* at 1089-90. The *Perry* court noted that other jurisdictions have recognized the public policy exception when the employer terminated an employee for the employee's "(1) refusal to commit an unlawful act, (2) performance of an important public obligation or (3) exercise of a statutory right or privilege." *Id.* at

policy exceptions to the facts of the case, the court concluded that although the plaintiff's complaint did not fall within any of the recognized categories of exceptions, the court would alter the employment-at-will doctrine if the proper facts existed.[42]

E. Duty of Good Faith and Grounds for Termination Considered in Enforceability of an Employment Contract

In *Empiregas, Inc., v. Bain*,[43] the Mississippi Supreme Court applied the contractual duty to deal in good faith[44] to an employment contract involving restrictive covenants.[45] Although the court acknowledged Mississippi's adherence to the

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1089 (citing *Protecting Employees, supra* note 13, at 1932). The court also noted that adoption of the public policy exception required a "'clearly defined and well established'" public policy. *Id.* (quoting Ward v. Frito Lay, Inc., 290 N.W.2d 536, 538 (Wis. 1980)). The court further noted that potential sources of public policy included legislation, regulations, and judicial decisions. *Id.* at 1089-90 (citing Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980)); *cf.* Time Ins. Co. v. Sams, 692 F. Supp. 663, 669 (N.D. Miss. 1988) (reviewing *Kelly* decision for guidance on public policy issues).

[42] *Perry*, 508 So. 2d 1090. The court stated that it might consider overruling *Kelly* if a plaintiff could prove that he would benefit from the change in the law. *Id.* Pursuant to *Perry* dicta, a federal district court allowed a plaintiff to seek damages based on the public policy exception. Laws v. Aetna Fin. Co., 667 F. Supp. 342, 346 (N.D. Miss. 1987); *see also* Pinnix v. Babcock & Wilcox, Inc., 689 F. Supp. 634, 637 (N.D. Miss. 1988) (recognizing that Mississippi Supreme Court would adopt narrow exception to at-will doctrine if plaintiff could prove that employer fired him for refusal to commit unlawful act). *But see* Russell v. Schering-Plough Corp., 725 F. Supp. 901, 902 (S.D. Miss. 1989) (refusing to allow plaintiff to pursue claim of wrongful discharge based on public policy exception because facts of case differed significantly from facts in *Laws*).

[43] 599 So. 2d 971 (Miss. 1992).

[44] *Empiregas*, 599 So. 2d at 976. The implied covenant to deal in good faith obligates each party in a contract to "refrain from injuring in any way the other's right to receive the benefits of the contract." McCormick, *supra* note 14, at 57-58 & n.80 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1965)). This covenant applies traditionally only to commercial transactions; however, a few jurisdictions have adopted the covenant in regard to employment contracts. *Id.* at 58 & n.81. For Mississippi's past treatment of the covenant, see *supra* notes 37-40 and accompanying text.

[45] *Empiregas*, 599 So. 2d at 976-77. In *Empiregas*, the employer sued to enforce a non-competition clause in the contract of a discharged employee who went to work for a competing company. *Id.* at 971-73.

at-will doctrine, it addressed the reasons for the employee's termination "so that he may be afforded all equitable relief to which he is entitled."[46] As such, the court incorporated the reasons for the employee's termination into its assessment of the enforceability of the contract.[47] Based on traditional contract principles, the court concluded that the non-compete agreement was not enforceable.[48] The court opined that "when an employer terminate[s] an employee in bad faith, the terms of a non-competition agreement will not be enforced."[49] Therefore, the court applied the implied covenant to deal in good faith to an employment contract to create obligations for the parties to that contract.[50]

II. McARN V. ALLIED BRUCE-TERMINIX CO.

In *McArn v. Allied Bruce-Terminix*,[51] the Mississippi Supreme Court addressed the issue of whether the employment-at-will doctrine allowed an employer to dismiss an employee for refusing to participate in unlawful activity.[52] The court's

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[46] *Id.* at 974; *see* Frierson v. Sheppard Bldg. Supply Co., 154 So. 2d 151, 155 (Miss. 1963) (commenting that court could "lend the hand of equity" when finding that discharge of employee was in bad faith or arbitrary). The court found that the defendant had discharged the employee without cause. *Empiregas*, 599 So. 2d at 975.

[47] *Empiregas*, 599 So. 2d at 976. Finding that the termination was without cause, the court then reviewed the nature of non-competition agreements by balancing the individual rights of the various involved parties: the employer, the employee, and the public. *Id.* at 975-76 (citing Texas Rd. Boring Co. v. Parker, 194 So. 2d 885, 888 (Miss. 1967)). The court found that the non-competition agreements constituted no threat to the public but that enforcement of the agreement would have a more oppressive effect on the employee than the employer. *Id.*

[48] *Id.* at 976; *see, e.g.*, Thames v. Davis & Goulet Ins., Inc., 420 So. 2d 1041, 1043 (Miss. 1982) (noting that employer must prove reasonableness and economic justification of contract provision for court to enforce restrictive covenant).

[49] *Empiregas*, 599 So. 2d at 976. Furthermore, the court ruled that the plaintiff was entitled to damages pursuant to his employment contract because the employer had breached his duty to deal in good faith when discharging the employee without good cause. *Id.* at 977.

[50] *Id.* at 976-77. *But see supra* notes 37-40 and accompanying text.

[51] 626 So. 2d 603 (Miss. 1993).

[52] *McArn*, 626 So. 2d at 606. For the trial court's treatment of the case, *see supra* note 11 and accompanying text.

analysis of the issue focused on its review of prior courts' treatment of the doctrine.[53] Beginning with *Kelly*, the court noted judicial unwillingness to tamper with a remedy created by the Legislature.[54] Then, in *Shaw*, the court referenced the increasing criticism aimed at the doctrine.[55] Moreover, in *Perry*, the court found interest in adopting the public policy exception; however, the facts of *Perry* did not present the proper opportunity to do so.[56] Furthermore, the court observed that the *Empiregas* court considered the reasons for termination when assessing the equitable relief available to discharged employees.[57] Also, the court commented that *Bobbitt* suggested the need for a "wiser and more humane alternative" to the rule.[58] Finally, the court noted that in *Laws* a federal district court had held that the Mississippi Supreme Court would adopt the public policy exception given the proper opportunity.[59]

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[53] *McArn*, 626 So. 2d at 606-07; *see also* Petermann v. International Bhd. of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (holding that employee discharged for refusal to commit illegal act could seek remedy against employer).

[54] *McArn*, 626 So. 2d at 606 (citing Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874 (Miss. 1981)). For further discussion of *Kelly*, see *supra* notes 18-25 and accompanying text.

[55] *McArn*, 626 So. 2d at 606 (citing Shaw v. Burchfield, 481 So. 2d 247, 248, 254 (Miss. 1985)). For a discussion of *Shaw*, see *supra* notes 27-34 and accompanying text.

[56] *McArn*, 626 So. 2d at 606 (citing Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1089 (Miss. 1987)). The court also noted the *Perry* court's analysis of the implied covenant of good faith and fair dealing. *Id.* For a discussion of *Perry*, see *supra* notes 35-42 and accompanying text.

[57] *McArn*, 626 So. 2d at 607 (citing Empiregas, Inc., v. Bain, 599 So. 2d 971, 974 (Miss. 1992)). The court noted that the *Empiregas* court addressed the reasons for the discharge of the plaintiff "to afford him all the equitable relief to which he was entitled." *Id.* For further discussion of *Empiregas*, see *supra* notes 43-50 and accompanying text.

[58] *McArn*, 626 So. 2d at 607 (citing Bobbitt v. The Orchard, Ltd., 603 So. 2d 356, 361 (Miss. 1992)). The court stated that the *Bobbitt* case involved an employee manual that outlined administrative procedures. *Id.*; *see supra* note 37.

[59] *McArn*, 626 So. 2d at 607 (citing Laws v. Aetna Fin. Co., 667 F. Supp. 342, 343-44 (N.D. Miss. 1987)) (commenting that in *Laws* "the federal judge noted that dicta from the Mississippi Supreme Court persuaded him that our Court would recognize a cause of action under the circumstances alleged in that case"). For further discussion of *Laws*, see *supra* notes 25, 33.

Given its review of prior opinions, the court unanimously held that a public policy exception to the at-will doctrine pertained to "at least" two specific circumstances.[60] Such enumerated circumstances existed when an employer discharged an employee either for refusing to participate in an illegal act or for reporting illegal acts of the employer.[61] If an employer discharged an employee for either of these two reasons, the dismissed employee could seek compensation via a tort action against his employer.[62] However, the court emphasized that the public policy exception to the employment-at-will doctrine was "narrow" and "limited."[63]

III. DISCUSSION

In *McArn*, Mississippi adopted the public policy exception to the employment-at-will doctrine. The following section of this case note examines the possible future ramifications of *McArn* on the legal system and on employment relations in Mississippi. Moreover, it explores the possibility of an expansion of the public policy exception to the at-will doctrine, the likelihood of adoption of the duty to act in good faith in employment contracts, and the probability of legislative action in the field of employment law.

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[60] *McArn*, 626 So. 2d at 607. The court added that the exception applied whether a written contract existed or not. *Id.*

[61] *Id.* These exceptions applied even when "privately made law" governed the relationship and when the general public was affected. *Id.*

[62] *Id.* at 607. Previous to *McArn*, Mississippi had already allowed discharged employees to seek damages against employers based on breach of contract. For a discussion of these breach of contract claims, see *supra* note 37.

However, the court left "for another day" the question of whether plaintiffs could recover punitive damages from the claim and whether bad faith constituted a basis of liability. *Id.* at 608.

[63] *Id.* at 607. The court also stated that the two enumerated situations constituted "at least" two circumstances where the exceptions applied. *Id.*

A. *Impact of* McArn *on the Legal System*

The increasing criticism aimed at the employment-at-will doctrine, as reflected in decisions prior to *McArn*,[64] influenced the supreme court's acceptance of the public policy exception to the doctrine.[65] If future decisions interpret *McArn* narrowly, then the two sets of circumstances specified in the *McArn* case[66] and the presently recognized contract exceptions[67] may constitute the only exceptions recognized in Mississippi. However, if future decisions expand the holding in *McArn*, then the courts may allow discharged employees to seek damages for wrongful discharge in other situations not specified in *McArn*.[68] Essentially, *McArn* neither established nor defined the contours of the public policy exception since it stated that it would address these issues on another day.[69] Thus, courts in the future may have to determine whether to interpret *McArn* broadly or narrowly.

1. *The Possible Expansion of Public Policy Exceptions to the Employment-at-Will Doctrine*

A court narrowly construing *McArn* may conclude that only in the two situations specified in the opinion may the public policy exception to the employment-at-will doctrine

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[64] *See supra* notes 18-51, 54-59 and accompanying text.

[65] *See supra* notes 12, 60-62 and accompanying text.

[66] *See supra* notes 12, 60-62 and accompanying text.

[67] *See supra* notes 37, 44-50 and accompanying text.

[68] For public policy exceptions adopted by other jurisdictions, see *supra* notes 20, 41 and accompanying text. For example, in addition to applying the public policy exception when an employer discharges an employee for refusing to commit an illegal act or for reporting an illegal act, courts in some other jurisdictions allow the exception when an employer terminates an employee for performing a vital public function or when an employer discharges an employee for exercising a legal right or privilege. *See supra* notes 20, 41 and accompanying text. Also, a minority of jurisdictions recognize the contract notion of bad faith as a basis of liability in a tort action for wrongful discharge. *See Protecting Employees, supra* note 13, at 1935 & nn.40-43; *see also* McCormick, *supra* note 14, at 58 & n.81 (listing jurisdictions adopting duty of good faith in employment contracts but noting that majority of states have rejected covenant because of its inconsistency with employment-at-will theory).

[69] *See supra* notes 12, 62-63 and accompanying text.

apply.[70] Consequently, if other situations arise where an employer's decision to terminate an employee adversely affects the public interest, the *McArn* decision may not provide a source of relief for the aggrieved party.[71] For example, the employer would still maintain the prerogative to discharge an employee for any reason, including a reason that the employee filed a workmen's compensation claim.[72] Also, the employer would incur no liability for terminating an employee for performing a public duty, such as serving jury duty.[73] Thus, the *McArn* decision may have no effect on the *Kelly* decision since courts may interpret *McArn* as only pertaining to situations involving illegal activities, not situations concerning the exercise of statutory rights.

However, a broader construction of *McArn* may allow a discharged employee to pursue a wrongful discharge claim based on other situations where the employer's termination of that employee contravenes public policy.[74] As a result, the courts may allow public policy exceptions in situations where the employer discharges the employee for exercising legal rights or for performing public obligations.[75] If courts permit these types of exceptions, then *Kelly* may not remain the law of Mississippi.[76] However, in order to allow a discharged employee to pursue damages based on the public policy exception, the courts should first define "public policy" to avoid future confusion.[77] A clear and precise definition would guide courts in determining when an employer's discharge of an employee adversely affects public policy.[78]

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[70] *See supra* notes 12, 60-62 and accompanying text.

[71] *But see supra* notes 20, 41.

[72] *See, e.g., supra* notes 18-25 and accompanying text.

[73] *But see supra* notes 20, 41.

[74] *See, e.g., supra* notes 20, 41.

[75] *See, e.g., supra* notes 20, 41.

[76] *See supra* notes 18-25 and accompanying text.

[77] *See Protecting Employees, supra* note 13, at 1947-50; *see also supra* note 41.

[78] *See supra* note 41. Otherwise, possible effects of an imprecise definition could include erratic application by the courts, the uncertainty of plaintiffs in assessing whether they possess a valid claim, and the loss of protection of employer rights. *See* Brake, *supra* note 14, at 223-34.

2. *The Possibility of Imposing Duty to Act in Good Faith in Employment Contracts*

In *McArn*, the court left open the question of whether bad faith could constitute a potential basis of liability.[79] Because previous cases conflict as to the applicability of the duty of good faith to employment contracts,[80] it is uncertain whether Mississippi courts in the future would permit it. A tort claim of wrongful discharge based on the employer's bad faith is a progressive claim that only a few states have adopted.[81] The adoption of the covenant of good faith and fair dealing as a basis of liability for wrongful discharge may indicate the demise of the employment-at-will doctrine since the two doctrines contradict each other.[82] The duty of good faith may require the employer to use good faith when terminating an employee.[83] In other words, the employer could not terminate an employee for no cause or a wrong cause.

B. The Possibility of Legislative Action

The Mississippi Legislature may enact laws to protect the rights of discharged employees.[84] *Kelly* alluded to the Legislature as being the proper law-making body to create laws to protect employees from retaliatory discharge for filing a

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[79] *See supra* notes 12, 62 and accompanying text. The court also left open the question of whether employees seeking recovery for wrongful discharge could recover punitive damages. *See supra* notes 12, 62 and accompanying text. The court in *McArn* allowed the plaintiff to pursue compensatory damages against his employer if he could prove that his claim fell within one of the specified public policy exceptions. *See supra* notes 12, 60-62 and accompanying text. It is difficult to predict whether future courts will allow plaintiffs filing tort actions for wrongful discharge to recover punitive damages since prior case law is contradictory. *See* Erdman, *supra* note 16, at 114-15 & nn.47-48 (distinguishing damages in tort and contract claims); *see also supra* note 25.

[80] *See supra* notes 37-40, 43-50 and accompanying text.

[81] *See Protecting Employees, supra* note 13, at 1935 & nn.40-43; *see also* McCormick, *supra* note 14, at 58 & n.81.

[82] *See supra* notes 13-14, 37-40, and 43-50 and accompanying text.

[83] *See Protecting Employees, supra* note 13, at 1935 & nn.40-43; *see also* McCormick, *supra* note 14, at 58 & n.81.

[84] *See supra* notes 23-25 and accompanying text.

workmen's compensation claim.[85] Other jurisdictions have enacted laws which protect not only employees wrongfully discharged for filing a workmen's compensation claim, but also employees terminated for reasons which their respective legislatures deemed violative of public interest.[86] Thus, the Legislature may alter this judicial doctrine legislatively, regardless of judicial action.

IV. CONCLUSION

McArn signals Mississippi's adoption of the public policy exception in two specific circumstances. On a broader scope, the case illustrates the Mississippi Supreme Court's concern that the employment-at-will doctrine reflect fairness and equality in an employment relationship. Now, in addition to contract exceptions to the doctrine, tort exceptions exist. As a result of *McArn*, the employer may incur tort liability for terminating an employee based on the employer's illegal activities. In the future, the court may adopt further exceptions to the doctrine, as evidenced by the court's mentioning of other potential bases of liability. For example, the court, in prior decisions, discussed the possible application of the duty of good faith to employment contracts. However, for now, *McArn* represents the court's acknowledgment that modification of the doctrine is necessary in some circumstances due to the public interest and public policy.

Debbie Ho

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[85] *See supra* notes 23-25 and accompanying text.
[86] *See* McCormick, *supra* note 14, at 73-80.

AGENCY—VICARIOUS LIABILITY—ATTORNEYS INCUR VICARIOUS LIABILITY FOR THE TORTS OF ASSOCIATED COUNSEL

On August 11, 1987, the parents of Maurice Kendall Washington employed attorney W.B. Duggins to pursue a medical malpractice claim on behalf of their son.[1] Soon thereafter, Duggins established a guardianship on their behalf and associated attorney Douglas Barfield to aid him in the case.[2] The attorneys agreed that Duggins would handle all client contact, while Barfield would draft and file a complaint and attempt to reach a suitable settlement agreement.[3]

Barfield began settlement negotiations, but never filed the complaint.[4] The parties eventually held a settlement conference, at which time Barfield received two settlement checks

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[1] Duggins v. Guardianship of Washington, 632 So. 2d 420, 422 (Miss. 1993). Duggins signed a contract in which he agreed to represent the Washington family. *Duggins*, 632 So. 2d at 422.

> This employment contract provided that Duggins would receive the following percentages as compensation: 33 1/2% of recovery if the case was settled before suit was filed; 40% of recovery if the case was settled after suit was filed but before trial; and 50% of recovery if the case proceeded to trial and judgment was rendered.

Id.

[2] *Duggins*, 632 So. 2d at 422-23. Duggins decided soon after accepting the case that he needed to associate counsel with experience in the field of medical malpractice. *Id.* at 422. His employment contract contained a provision which allowed him to hire additional counsel, so long as this action resulted in no extra costs to his clients. *Id.* Duggins obtained approval from Washington's parents and hired Barfield pursuant to that provision. *Id.* at 422-23.

[3] *Id.* at 423. The attorneys also agreed to divide all fees equally. *Id.*

[4] *Id.* Barfield sent Duggins a copy of a complaint which appeared to have been filed. *Id.* Thus, when Duggins later checked on the complaint and the clerk was unable to locate it, Duggins assumed that he had simply given the wrong information to the clerk. *Id.* Meanwhile, Barfield neglected to tell the insurance company with whom he was negotiating that he acted as co-counsel with Duggins. *Id.*

without Duggins' knowledge.[5] Duggins remained unaware of any serious problems with the case until he learned that Barfield had spent virtually all of the Guardianship's settlement money.[6]

The Guardianship filed an action for an accounting from Duggins and Barfield.[7] The Warren County Chancery Court found Duggins vicariously liable for any damages assessed against Barfield.[8] On appeal, the Mississippi Supreme Court

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[5] *Id.* at 423-24. Duggins assumed that any settlement checks would arrive by mail at a later time. *Id.* at 424. He allegedly asked Barfield not to cash any checks he received until they had an opportunity to work out any unresolved matters. *Id.* Duggins did not know that Barfield had already received the two settlement checks, made payable to Barfield and the Guardianship. *Id.*

[6] *Id.* at 425. Duggins first learned that Barfield had collected the settlement money when Barfield presented him with a check for attorney's fees in the amount of $27,000. *Id.* at 424. Duggins deposited the check because he believed that Barfield had filed a complaint and that the money represented his share of a $161,000 settlement. *Id.* Subsequently, Barfield presented Washington's parents with a bill for attorney's fees in the amount of $53,589 on what had actually been a $95,000 settlement. *Id.* Washington's father checked Duggins' employment contract to verify that the Guardianship owed 40% on any settlement reached after a suit was filed. *Id.* He then contacted Duggins and told him that he and Barfield actually owed the Guardianship money. *Id.*

Duggins called Barfield in an attempt to clarify the situation and left a message with Barfield's wife that some of the Guardianship money might have been misplaced. *Id.* at 424-25. Barfield never returned Duggins' call, but later informed Duggins by memo that he was moving to Tennessee and would settle the Guardianship account after all bills were paid. *Id.* at 425.

The memo from Barfield alarmed Duggins, who then contacted the circuit clerk's office to find a copy of the case complaint. *Id.* Through correspondence with that office, he learned that the complaint number Barfield had given him belonged to a case filed by Barfield two years earlier. *Id.*

By the time Duggins learned of Barfield's deceit, nothing remained of the Guardianship's settlement money except for a $1200 Certificate of Deposit purchased for the Guardianship. *Id.* In addition to the $27,000 he paid to Duggins as attorney's fees, Barfield paid $14,500 to Washington's parents after receiving the settlement checks. *Id.* at 424. Barfield also wrote a $12,500 check to his wife, a $15,500 check to a third party, and as many as seven other checks for cash. *Id.*

[7] *Duggins*, 632 So. 2d at 422. Before the action went to trial, Barfield pled guilty to a felony and received a three year prison sentence. *Id.* at 425. The court suspended Barfield's sentence, and instead sent him to a restitution center. *Id.* Furthermore, Barfield's acts resulted in his disbarment from the practice of law. *Id.*

[8] *Id.* Barfield did not attend the trial due to his previous criminal conviction, and thus, the court entered a default judgment against him. *Id.*

held: Affirmed in part; reversed and remanded in part.[9] The court held that in a joint venture or partnership situation, an attorney could be vicariously liable for the acts of an associated attorney.[10]

I. RELATED LAW

The idea of vicarious liability originated under the law of agency.[11] Although vicarious liability could only be imposed under two of the three branches of agency law, those two branches encompassed a variety of relationships.[12] For exam-

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[9] *Id.* at 432. The supreme court affirmed the trial court's ruling which held Duggins vicariously liable for Barfield's actions and for punitive damages. *Id.* The court also affirmed the lower court's holding requiring that the Guardianship be made whole. *Id.* The court reversed and remanded the case on the issues of attorney's fees owed to the Guardianship's attorney in the accounting action and to Duggins for his representation of the Guardianship in the malpractice action. *Id.*

[10] *Id.* at 429-30. The court relied on the rules of the Uniform Partnership Act and case law from other jurisdictions to arrive at this holding. *Id.*

[11] *See* MERTON FERSON, PRINCIPLES OF AGENCY §§ 5-7 (1954). Ferson pointed out that although the doctrines traditionally used to hold one person liable for the acts of another developed under different theories of law, they were grouped together under the agency label. *Id.* The courts used the law of torts to establish a doctrine which stated that a master would be liable for the torts of his servant. *Id.* § 6. This idea eventually became known as the doctrine of respondeat superior. *Id.* On the other hand, the courts looked to the law of contracts to establish the doctrine which made a principal liable for the acts of his agent. *Id.*

[12] *See* HARRY G. HENN, AGENCY, PARTNERSHIP AND OTHER UNINCORPORATED BUSINESS ENTERPRISES 4 (1972). Henn noted three basic branches of agency law: (a) Principal-Agent; (b) Master-Servant (which Henn considered as a subpart of (a)); and (c) Employer-Independent Contractor. *Id.* The general rule developed by English and American courts was that an employer would not be held liable for the torts of an independent contractor. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 509 (5th ed. 1984); *see, e.g.*, Mississippi Power Co. v. Brooks, 309 So. 2d 863, 866 (Miss. 1975) (declaring that general rule would not allow employer to incur vicarious liability for torts of independent contractor); Mississippi Power & Light Co. v. Walters, 158 So. 2d 2, 26 (Miss. 1963) (stating general rule that employer was not liable for torts of independent contractors), *modified on other grounds*, 160 So. 2d 908 (Miss. 1964); Callahan Constr. Co. v. Rayburn, 69 So. 669, 670-71 (Miss. 1915) (establishing in Mississippi rule that employer was not liable for torts of independent contractor). Although there were exceptions provided to this rule, these exceptions usually required some negligent action by the employer. FERSON, *supra* note 11, § 108. Thus, in such instances where the court has held an employer liable for a resulting tort,

ple, it has long been held that the law governing partnerships found its roots in agency law.[13] Mississippi courts have often affirmed such a holding by recognizing that the relationship among partners was synonymous with that of principal and agent.[14]

A. Common Law Vicarious Liability in Mississippi

One of the earliest Mississippi decisions recognizing that a partner could be held vicariously liable for the acts of a co-partner due to agency rules was the 1856 case of *Heirn v. McCaughan*.[15] In *Heirn*, a married couple brought suit against the owners of a common carrier after the carrier failed to board passengers in accordance with the advertisements of one owner.[16] The court ruled that where one partner acted

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"his liability is not vicarious in the sense that he is made to pay for injuries that he had no part in bringing about." *Id.*

[13] JOSEPH STORY, STORY ON PARTNERSHIP § 1, at 3 & n.1 (Boston, Little, Brown & Co. 1889). Justice Story once declared, "The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify . . . the questions which arise on the subject, if this true principle were more constantly kept in view." *Id.* at 3 n.1. A partnership is a branch of agency law. 68 C.J.S. *Partnership* § 136 (1950). The authors explained that a partner acts as both a principal and an agent. *Id.* When a partner has acted for himself, he has taken on the role of a principal. *Id.* On the other hand, when he has acted for the other partners, he has become an agent. *Id.* Therefore, the law which determined the rights and liabilities of agents would be equally applicable to partners. *Id.*

[14] *See* Davis v. Richardson, 45 Miss. 499, 507 (1871) (noting previous holding of court that one partner constituted agent of others); Faler v. Jordan, 44 Miss. 283, 287 (1870) (holding that each partner was agent of others as to all matters within scope of partnership dealings); *see also* Entente Mineral Co. v. Parker, 956 F.2d 524, 526 (5th Cir. 1992) (holding that vicarious liability among partners would be assessed under agency principles); Persons v. Oldfield, 57 So. 417, 417 (Miss. 1912) (stating that authority of one partner to bind another sprang from agency theories).

[15] 32 Miss. 17 (1856).

[16] *Heirn*, 32 Miss. at 20-22. Defendant Heirn was the co-owner of several steamboats, along with Grant, Geddes and Day. *Id.* at 20. On December 20, 1853, Geddes advertised that one of the steamboats would stop in Pascagoula on December 24, 1853, to pick up passengers who wished to go to Mobile. *Id.* at 20-21. McCaughan and his wife saw the notice posted at the Pascagoula post office and subsequently sent their schooner home, planning to take the boat. *Id.* at 21. On the night the boat was to arrive, the McCaughans ventured out to the pier-head

within the scope of a partnership's business, he would be considered an agent of his co-partners, and they would be liable to the same extent as the actor for his wrongful conduct.[17]

In 1866, the Mississippi Supreme Court extended vicarious liability to all principal and agent relationships with the case of *New Orleans, Jackson, and Great Northern Railroad Co. v. Bailey*.[18] In *Bailey*, the plaintiff suffered permanent injuries after a locomotive owned by the defendant struck a railroad car on which the plaintiff was standing.[19] The supreme court affirmed a lower court ruling imposing liability on

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at approximately nine o'clock. *Id.* Witnesses testified that the weather was perilous and that Mrs. McCaughan was pregnant and in ill health. *Id.* at 22. The couple waited until sunrise for the boat, which never stopped. *Id.* The plaintiffs proved that the partner operating the boat (Grant) knew that he was supposed to stop in Pascagoula, but refused to do so. *Id.*

[17] *Id.* at 50. Heirn appealed the judgment whereby the trial court found him liable for the acts of his co-partners even though he was not a participant in the wrongdoing. *Id.*; *see* Idom v. Weeks, 99 So. 761, 763 (Miss. 1924) (noting that one partner may be liable for acts of co-partner); RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 5.3, at 268 (3d ed. 1989) (stating that partner who was innocent of any wrongdoing could be liable for torts of co-partner); JAMES PARSONS, PRINCIPLES OF PARTNERSHIP § 139 (Boston, Little, Brown & Co. 1889) (maintaining that partner would be required to answer for tort of co-partner). *See generally* Beane v. Bowden, 399 So. 2d 1358, 1360 (Miss. 1981) (holding that partner who acted by himself could bind his fellow partner within course of partnership business); Baker v. Connecticut Gen. Life Ins. Co., 18 So. 2d 438, 439-40 (Miss. 1944) (observing that partner had right to act for or bind all co-partners within course of partnership business).

The court also held that under the principles of equal liability, Heirn could be vicariously liable for punitive damages as well. *Heirn*, 32 Miss. at 50-51; *see also* Robinson v. Goings, 63 Miss. 500, 504 (1886) (holding that party innocent of any wrongdoing was vicariously liable for punitive damages for his partner's wrongful conduct).

[18] 40 Miss. 395 (1866).

[19] *Bailey*, 40 Miss. at 396. Bailey worked as a shipper and warehouser of cotton. *Id.* He had secured the use of a side track owned by the Mississippi Central Railroad Company for the purpose of loading and unloading his cotton at his warehouse near the defendant's passenger depot. *Id.* On the night of November 22, 1859, a locomotive operated by the defendant's employees struck the car which Bailey was loading. *Id.* The impact threw Bailey to the ground between the car he was loading and another loaded car. *Id.* Bailey suffered injuries from the accident and provided testimony that those injuries had left him permanently disabled. *Id.* at 397. He sued the railroad for damages in the amount of $50,000. *Id.* at 395.

the defendant railroad for the negligent acts of its agents.[20] In its holding, the court recognized the validity of this vicarious liability rule, and stressed the importance of its application.[21]

In subsequent decisions, the court applied the vicarious liability rule to cases involving principal and agent relationships.[22] In addition, the court broadened the possible applications of vicarious liability in the case of *Sample v. Romine*[23] to include persons engaged in joint ventures. In *Sample*, the court held that partnerships and joint ventures were ultimately the same.[24] The court determined that the two differed only because joint ventures related to a single transaction of a shorter duration, while partnerships usually indicated a con-

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[20] *Id.* at 452. Before ruling on the lower court's decision, the court looked to various books, treatises and authorities, including *Heirn*, and other similar Mississippi cases. *See, e.g.*, New Orleans, J. & G.N.R.R. v. Allbritton, 38 Miss. 242, 277-78 (1859) (holding that where employment by principal afforded agent opportunity to injure third person, principal would be responsible for negligent or willful acts of agent which caused injury).

[21] *Bailey*, 40 Miss. at 452. In explaining its decision, the court declared that "no general rule seems to be more firmly established than that which holds that the principal is *civilly* responsible in damages for the acts of his agents, whether negligent or wilful, done in his employment, to the same extent as if the *principal himself* were the actual wrongdoer." *Id.* The court pointed out that the rule remained valid, even though some courts wavered in applying it to difficult fact situations. *Id.* Furthermore, the court noted that rather than applying the rule sporadically to the cases with simple questions, judges should apply it to all cases involving the principal-agent relationship. *Id.*

[22] *See* Sears, Roebuck & Co. v. Creekmore, 23 So. 2d 250, 252 (Miss. 1945) (including in scope of employment all tortious acts which were "incidental" to authorized conduct); Miller v. Teche Lines, 167 So. 52, 53 (Miss. 1936) (declaring that rule which imposed liability on principal for acts of agent should be limited to situations where agent acted within scope of his employment or in furtherance of master's business); Loper v. Yazoo & M.V.R., 145 So. 743, 745 (Miss. 1933) (remarking that unauthorized conduct of servant was not necessarily outside "scope of employment" if such conduct was generally similar to authorized conduct); Alden Mills v. Pendergraft, 115 So. 713, 714 (Miss. 1928) (stating that principal incurred liability for acts performed by his agent in furtherance of principal's business, even though agent acted in excess of his authority).

[23] 8 So. 2d 257 (Miss. 1942).

[24] *Sample*, 8 So. 2d at 261. The Mississippi Supreme Court stated that "rights" and "duties" were virtually the same for joint ventures and partnerships. *Id.*; *see* Scott Co. v. Enco Constr. Co., 264 So. 2d 409, 411 (Miss. 1972).

tinuing business.[25]

Although the *Sample* case provided the courts with a chance to impose vicarious liability on joint venturers, that became even easier with the 1967 case of *Tansil v. Horlock*.[26] The *Tansil* court expounded on the *Sample* holding when it stated that one joint venturer could bind another with regard to liabilities to third parties on any matter within the scope of the venture.[27]

B. Statutorily Imposed Vicarious Liability in Mississippi

The Mississippi Supreme Court imposed vicarious liability by using the common law rules outlined in these cases until the Legislature statutorily imposed such liability by adopting the Uniform Partnership Act [hereinafter UPA].[28] The UPA has acted as a supplement to the common law involving partnerships and has provided a firm set of rules to govern all related actions.[29] It provides a definition of a partnership which can be used by the courts,[30] as well as specific rules for

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[25] *Sample*, 8 So. 2d at 261; *see* Foster v. Wright, 127 So. 2d 873, 877 (Miss. 1961) (finding joint ventures typically less formal than partnerships); *see also* Davis v. Noblitt & Capers Elec. Co., 594 So. 2d 610, 613 (Miss. 1992) (noting that joint ventures and partnerships were virtually identical, and differed only in that joint ventures had more "circumscribed boundaries"); *cf.* Fewell v. American Surety Co., 28 So. 755, 757 (Miss. 1900) (noting that courts needed to look to intent of parties in order to determine if joint venture actually constituted partnership).

[26] 204 So. 2d 457 (Miss. 1967).

[27] *Tansil*, 204 So. 2d at 461; *see* Jim Murphy & Assocs. v. LeBleu, 511 So. 2d 886, 892 (Miss. 1987) (maintaining idea that one joint venturer could obligate another on actions within scope of venture without knowledge of other venturer).

[28] MISS. CODE ANN. § 79-12-1 (1989). Mississippi adopted the UPA on April 1, 1977. *Id.* § 79-12-1. Professor William Draper Lewis authored the final version of the UPA. 1 SCOTT ROWLEY, ROWLEY ON PARTNERSHIP § 1.2, at 10 (2d ed. 1960). The Conference on Uniform State Laws adopted the UPA in 1914. *Id.* By 1950, more than 30 state legislatures had adopted the Act. *Id.* at 10. Mississippi titled its version of the Act the "Mississippi Uniform Partnership Law." MISS. CODE ANN. § 79-12-1 (1989).

[29] *See* 59 AM. JUR. 2D *Partnership* § 662 (1987) (remarking that UPA codified common law); *see also* Smith v. Redd, 593 So. 2d 989, 993 (Miss. 1992) (noting that UPA codified common law, but common law still supplemented statutes).

[30] MISS. CODE ANN. § 79-12-11 (1989). This section defines a partnership as

determining if a partnership exists.[31] In addition, the UPA supplements previous judicial decisions by declaring that each partner acts as an agent for the partnership,[32] and that each partner is vicariously liable for the wrongful acts of a co-partner.[33]

In 1985, the court re-examined the joint venture in the case of *Hults v. Tillman*.[34] In *Hults*, the court defined a joint venture as a "single shot partnership,"[35] and combined statutory law with case law to hold that the UPA would apply to joint ventures.[36]

"an association of two (2) or more persons to carry on as co-owners a business for profit." *Id.*

[31] MISS. CODE ANN. § 79-12-13 (1989). The statute describes several situations not necessarily indicative of a partnership. *Id.* Such instances include joint tenancy, joint or common property, or tenancy in common where the co-owners do not share in profits derived from the property. *Id.* Furthermore, the statute notes that the "sharing of gross returns" alone does not indicate a partnership. *Id.* However, the statute provides that the sharing of profits from a business constitutes a prima facie existence of a partnership. *Id.*

[32] MISS. CODE ANN. § 79-12-17 (1989). Section 79-12-17 states in relevant part:

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the business of a partnership of which he is a member binds the partnership . . . unless the partner . . . has in fact no authority to act for the partnership . . . and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Id.

[33] MISS. CODE ANN. § 79-12-25 (1989). Section 79-12-25 states:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of business of the partnership . . . loss or injury is caused to any person, not being a partner in the partnership . . . the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Id.

[34] 480 So. 2d 1134 (1985).

[35] *Hults*, 480 So. 2d at 1143. The court issued this statement after it considered case holdings, definitions and characteristics associated with a joint venture. *Id.*

[36] *Id.* at 1145; *see* Allied Steel Corp. v. Cooper, 607 So. 2d 113, 116 (Miss. 1992) (noting that UPA codified common law); Whittington v. Whittington, 535 So. 2d 573, 585-86 (Miss. 1988) (acknowledging and following holding of *Hults* applying UPA to joint venture), *overruled on other grounds by* C & C Trucking v.

C. *Vicarious Liability of Associated Attorneys in Other Jurisdictions*

Courts in jurisdictions outside of Mississippi have previously determined that an attorney incurs some liability, or at least responsibility, for the acts of an associated attorney.[37] For example, the New Jersey courts addressed this issue in the case of *Tormo v. Yormark*.[38] In *Tormo*, an attorney referred a case to an out-of-state attorney, who subsequently settled the case and embezzled the proceeds.[39] The court held

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Smith, 612 So. 2d 1092 (Miss. 1992). *But see* Keppner v. Gulf Shores, Inc., 462 So. 2d 719, 723 (Miss. 1985) (providing example of joint venture constituting "special situation" exempt from UPA coverage).

[37] *See* Floro v. Lawton, 10 Cal. Rptr. 98, 106 (Cal. App. 2d 1960) (holding that if associated attorney was found liable for malpractice, attorney who hired him would automatically be vicariously liable). *See generally* J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 348 & n.5 (D. Conn. 1981) (stating that attorney retained responsibility for supervising all litigation even though he employed co-counsel to assist him, and therefore, attorney could be liable for duties neglected by co-counsel); Moore v. State Bar, 396 P.2d 577, 581 (Cal. 1964) (holding that attorney was "derelict" in his duties for failing to insure that his employed attorney adequately handled his client's case); Gudger v. Manton, 134 P.2d 217, 224 (Cal. 1943) (noting that non-resident attorney employing local counsel was liable for tortious acts committed by those attorneys within scope of their employment). *But see* Wilderman v. Wachtell, 267 N.Y.S. 840, 842 (N.Y. Sup. Ct. 1933) (holding that attorney should not be liable for negligence of attorney he associated, with client's permission, to handle out-of-state procedural issues), *aff'd*, 271 N.Y.S. 954 (N.Y. App. Div. 1934).

[38] 398 F. Supp. 1159 (D.N.J. 1975).

[39] *Tormo*, 398 F. Supp. at 1166-68. In 1968, plaintiffs hired New York attorney Edward Devlin to pursue a settlement for a personal injury claim on behalf of Karen Wendell Tormo, who was an unmarried infant at that time. *Id.* at 1165-66. Defendant Yormark, a New Jersey attorney, subsequently contacted Devlin and expressed an interest in helping with the case. *Id.* at 1166. Devlin refused any help at that time. *Id.* By 1970, however, Devlin had not settled the claim, and Tormo had married, moved to Spain, and obtained Spanish citizenship. *Id.* at 1166. Tormo's change of residence eliminated New York as a proper venue for her claim, and thus required that the action be pursued in New Jersey where the accident had occurred. *Id.* Because Devlin lacked a license to practice law outside of New York, he referred the case to Yormark. *Id.* Before referring the case, Devlin checked only to see that Yormark was a licensed attorney in New Jersey. *Id.* at 1167. Devlin was unaware that Yormark had been indicted for criminal activity in New Jersey in 1969. *Id.* at 1166-67. In 1971 a New Jersey court convicted Yormark for his crimes, leading to Yormark's subsequent disbarment. *Id.* However, Yormark continued to pursue the injury claim on behalf of Tormo after his

that where the referring attorney received sufficient notice that the out-of-state counsel had engaged in unethical conduct, the referring attorney could be liable for the subsequent tortious conduct of the out-of-state attorney.[40]

Additionally, other courts have made possible the imposition of vicarious liability among attorneys and associated counsel by holding that the relationship constituted a joint venture.[41] The Oregon case of *Fitzgibbon v. Carey*[42] provides a clear illustration of such a holding. In *Fitzgibbon*, the court ruled that where a law partnership associated a legal corporation to pursue a class action suit, a joint venture existed.[43]

II. *DUGGINS V. GUARDIANSHIP OF WASHINGTON*

A. Opinion of the Court

Justice Pittman, writing for the Mississippi Supreme Court, held that an attorney could incur liability for the tor-

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conviction. *Id.* at 1167. Yormack collected a $150,000 settlement from the claim and embezzled the money. *Id.* at 1167-68.

[40] *Id.* at 1170-71. The court ruled that although Devlin had a duty to use care in transferring his client's case to an out-of-state attorney, he was not necessarily negligent for failing to make additional inquiries about the attorney's reputation, once he found that Yormark had been licensed to practice law. *Id.* at 1169.

Furthermore, Devlin had no reason to know that Yormark was involved in criminal proceedings in another state. *Id.* at 1170-71. However, the court ruled that Devlin should have been placed on notice by Yormark's attempts to solicit employment, as such behavior violated the Code of Professional Responsibility. *Id.* at 1171. Specifically, the court held that an attorney was guilty of negligence if he referred his client's case to a lawyer who had engaged in such solicitation. *Id.*

[41] *See* Senneff v. Healy, 135 N.W. 27, 29 (Iowa 1912) (stating that joint venture existed where attorney associated two others to aid him, and all three agreed to share profits equally); Hill v. Curtis, 139 N.Y.S. 428, 428 (N.Y. App. Div. 1913) (holding that attorneys who agreed to share profits, expenses, and work were joint venturers).

[42] 688 P.2d 1367 (Or. Ct. App. 1984).

[43] *Fitzgibbon*, 688 P.2d at 1370-71. The court noted that a question concerning the elements necessary to create a joint venture was a question of law. *Id.* at 1369. Furthermore, the court stated that in the absence of an express contract creating a joint venture, the intent of the parties would govern. *Id.* at 1370. The court found that the evidence in *Fitzgibbon* indicated that the parties intended to share the work and profits as joint venturers. *Id.* at 1372.

tious acts of an associated attorney.[44] In reaching this conclusion, the court first rejected Duggins' argument that his relationship with Barfield was one of an independent contractor.[45] The court reasoned that since the attorneys agreed to divide the work and profits in the case, they were exercising joint control over and shared an equal "stake" in the outcome of the case.[46] For these reasons, the court held that where one attorney promises an associated attorney a percentage of a case's outcome, rather than a fixed fee, the resulting relationship is not that of an independent contractor.[47]

Next, the court determined that partnership law governed the relationship between Duggins and Barfield.[48] Applying the Mississippi UPA, the court found that a partner who acted within the scope of his employment was an agent of the partnership.[49] Furthermore, the court noted that any injury caused by that partner would be imputed to the partnership.[50] Therefore, the court imputed Barfield's acts to Duggins.[51] In so holding, the court stated that a similar hold-

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[44] Duggins v. Guardianship of Washington, 632 So. 2d 420, 432 (Miss. 1993). The court determined that liability was the issue at the heart of this case. *Id.* at 426.

[45] *Duggins*, 632 So. 2d at 426. Duggins claimed that because his relationship with Barfield was one of an employer-independent contractor, he could not be liable for Barfield's actions. *Id.*

[46] *Id.* at 426-27. The court pointed out that an independent contractor was not subject to the control of an employer except as to the results of the work performed. *Id.* The court stated, however, that the division of work between Duggins and Barfield indicated joint control, while the equally shared profits indicated an equal interest in the case's outcome. *Id.* at 426.

[47] *Id.* at 426-27. The court determined that Barfield and Duggins' agreement to split the profits equally did not indicate a relationship of employer-independent contractor. *Id.*

[48] *Id.* at 427. The court stated that the relationship between Duggins and Barfield constituted a joint venture, at the very least. *Id.* The court then cited the relevant case law which declared that the UPA applies to joint ventures. *Id.*; *see, e.g.*, Whittington v. Whittington, 535 So. 2d 573, 585-86 (Miss. 1988); Hults v. Tillman, 480 So. 2d 1134, 1144-45 (Miss. 1985).

[49] *Duggins*, 632 So. 2d at 427. The court based this finding on § 79-12-17 of the Mississippi Code. *Id.*

[50] *Id.* The court referred to § 79-12-25 of the Mississippi Code which establishes liability among partners. *Id.*

[51] *Id.* at 428. The court pointed out that Barfield's misappropriation of the

ing could have been reached by applying the vicarious liability standards established by Mississippi common law.[52]

B. Concurrence of Justice Banks

Justices Banks, joined by Justice Lee, concurred in the court's opinion but wrote separately to address a secondary issue.[53] Specifically, Justice Banks maintained that the amount required to make the Guardianship "whole" would be the net proceeds from the settlement, less the attorney's fees owed to Duggins.[54]

C. Dissenting Opinion

Presiding Justice Lee wrote a dissenting opinion which criticized the majority for holding Duggins vicariously liable for punitive damages.[55] Justice Lee found that the majority's opinion was a broad departure from well-established Mississippi law regarding punitive damages.[56] Lee instead argued

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Guardianship's money was "well within the scope of the partnership's business." *Id.*

[52] *Id.* The court discussed case law establishing such liability. *Id.* at 428-29 (citing Robinson v. Goings, 63 Miss. 500 (1886) and Heirn v. McCaughan, 32 Miss. 17 (1856)).

[53] *Id.* at 432 (Banks, J., concurring in part). After the court imposed liability on Duggins for the actions of Barfield, it also ruled on several other issues. *Id.* at 431-32. First, the court affirmed the trial court's holding that the Guardianship needed to be restored, or made "whole." *Id.* The court then calculated an amount which would adequately restore the Guardianship to the financial position it occupied before Barfield misappropriated the Guardianship funds. *Id.* at 432. Next, the court declared that Duggins' representation of the Guardianship entitled him to attorney's fees. *Id.* at 431. However, the majority of the justices ruled that those fees would be paid to Duggins only after the Guardianship had been restored. *Id.* Justice Banks authored a separate opinion to address these issues. *Id.* at 432 (Banks, J., concurring in part).

[54] *Duggins*, 632 So. 2d at 432 (Banks, J., concurring in part). Banks indicated that the payment of attorney's fees to Duggins needed to occur simultaneously with the restoration of the Guardianship. *Id.* (Banks, J., concurring in part).

[55] *Id.* at 432-33 (Lee, J., dissenting). Justice Lee disagreed with the majority's decision that the imposition of vicarious liability extended to punitive damages. *Id.* (Lee, J., dissenting).

[56] *Id.* (Lee, J., dissenting). Justice Lee pointed to several previous decisions by the court which established specific guidelines for awarding punitive damages. *Id.*

that the narrow purposes for which courts allowed punitive damages does not justify their vicarious imposition.[57]

III. DISCUSSION

There can be no doubt that the *Duggins* decision will greatly impact Mississippi attorneys and the way they choose to handle the representation of their clients. This section will consider possible actions attorneys can take to avoid the liability established by *Duggins*. Furthermore, it will consider the probable effects of such liability on both the attorney and the client.

A. Possible Ways to Limit Liability

As a result of the *Duggins* holding, the attorney who previously avoided a partnership situation for liability reasons may now incur the same risk by associating additional counsel.[58] However, attorneys may seek to avoid liability through contractual agreements with their clients.[59] The *Duggins* de-

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(Lee, J., dissenting); *see* Strickland v. Rossini, 589 So. 2d 1268, 1268 (Miss. 1991) (observing that plaintiff was entitled to punitive damages only if defendant indicated "reckless disregard" for rights of others); South Central Bell v. Epps, 509 So. 2d 886, 892 (Miss. 1987) (noting that punitive damages should be awarded only in "extreme circumstances"); State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 249 (Miss. 1985) (stating that punitive damages are intended to warn others and should be allowed only with extreme caution); Gardner v. Jones, 464 So. 2d 1144, 1149 (Miss. 1985) (allowing punitive damages only where defendant injured plaintiff). Justice Lee also relied on section 11-1-65 of the Mississippi Code, which stated that punitive damages could be awarded only where *"the defendant against whom punitive damages are sought"* had acted with actual malice or gross negligence. *Duggins*, 632 So. 2d at 433 (Lee, J., dissenting). Justice Lee declared that this statute "absolutely" foreclosed vicarious liability for punitive damages. *Id.* (Lee, J., dissenting). Finally, Lee referred to the cases which the majority relied on as "a pair of Pre-cambrian cases" which had "not been followed by this Court in a single modern case." *Id.* (Lee, J., dissenting).

[57] *Id.* (Lee, J., dissenting). Justice Lee stated that the majority's opinion was clearly overruled by a "legion" of cases. *Id.* (Lee, J., dissenting).

[58] *See Duggins*, 632 So. 2d at 426. The *Duggins* court pointed out the risk of liability that accompanies association. *Id.*

[59] MALLEN & SMITH, *supra* note 17, § 5.6; *see also* Robert L. Misner, *Local Associated Counsel in the Federal District Courts: A Call for Change*, 67 CORNELL L. REV. 345, 369 n.173 (1982). The author points out that liability can be limited

cision demonstrates that client approval of an association will not shield an attorney from liability for the tortious acts of an associate.[60] Moreover, the decision proves that oral agreements among attorneys regarding the division of duties will in no way limit liability.[61] However, written agreements signed by the client which clearly delineate the duties of each attorney will probably prevent an attorney from incurring liability for wrongful conduct of the associated attorney.[62]

B. Possible Effects of Liability

The decision in *Duggins* indicates a possible policy implication for the attorney-client relationship. The *Duggins* holding has offered support for the previously established theory which concludes that, between an innocent attorney and a client, the attorney should bear any risk of a venture.[63]

Although clients may find such a policy appealing, it is almost certain to produce some adverse results. The increased risk for the attorney could result in increased fees for the client.[64] In addition, the quality of representation may de-

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contractually because mere association does not create liability. *Id.*

[60] *See* MALLEN & SMITH, *supra* note 17, § 5.6 In their book entitled Legal Malpractice, the authors noted the general rule that an attorney could incur liability for the tortious acts of an associated attorney even though the client consented to the latter's involvement. *Id.*

[61] *See supra* note 3 and accompanying text. Duggins and Barfield had an oral agreement concerning the division of work on the case. *See supra* note 3 and accompanying text.

[62] Misner, *supra* note 59, at 370. Misner points out that attorneys who associate nonresident counsel could most likely limit their liability by precisely outlining the duties of each attorney in a contract with the client. Misner, *supra* note 59, at 370; *see also* MALLEN & SMITH, *supra* note 17, § 5.6 (discussing similar method of limiting attorney liability). Mallen and Smith also note that an attorney who seeks to limit his liability by contract should clearly spell out the duties delegated to each attorney. MALLEN & SMITH, *supra* note 17, § 5.6.

[63] *See* Misner, *supra* note 59, at 350. Misner states that local association rules for attorneys are often justified under the theory that they protect innocent clients who have no knowledge of substantive and procedural issues of law. *Id.* at 350-51. Misner notes that such rules carry with them an enormous risk of liability for attorneys. *Id.* at 345.

[64] Misner, *supra* note 59, at 367 & n.157. An attorney must always consider potential liability and the risk of malpractice suits when he establishes a fee. *Id.*

crease as attorneys become more reluctant to associate additional counsel.[65] Finally, attorneys are almost certain to establish more specialized practices, and Mississippi could be forced to consider the adoption of a formal system of specialization.[66]

IV. CONCLUSION

The decision of the Mississippi Supreme Court in *Duggins v. Guardianship of Washington* is one which should place attorneys on notice of the risks involved with associating counsel. The holding imposes a higher standard of care on attorneys who employ colleagues to share in their work and profits. Whereas before the law required attorneys to exercise care to prevent negligence in their own actions, they must now seemingly act as insurers against the negligence of associated counsel. The *Duggins* decision guarantees that one who fails to exercise such care will incur liability.

Susan C. Spears

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[65] *See* MALLEN & SMITH, *supra* note 17, § 5.6. The decision to associate additional counsel "may be dictated by both *practical* and legal considerations." *Id.* (emphasis added).

[66] *See* JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE 15-17 (1981). Specialization is a topic of significant interest to many attorneys. *Id.* at 15. By 1981, as many as eight states had adopted specialization programs or procedures. *Id.* at 15-16. Specialization would allow an attorney to become more competent and well-versed in a specific area of law, and thus avoid the need for associated counsel. *Id.* at 17. However, specialization would decrease an attorney's opportunity to build a "good rapport" with his clients, as an attorney who specializes is more likely to represent his clients on a one-time only basis. *Id.*

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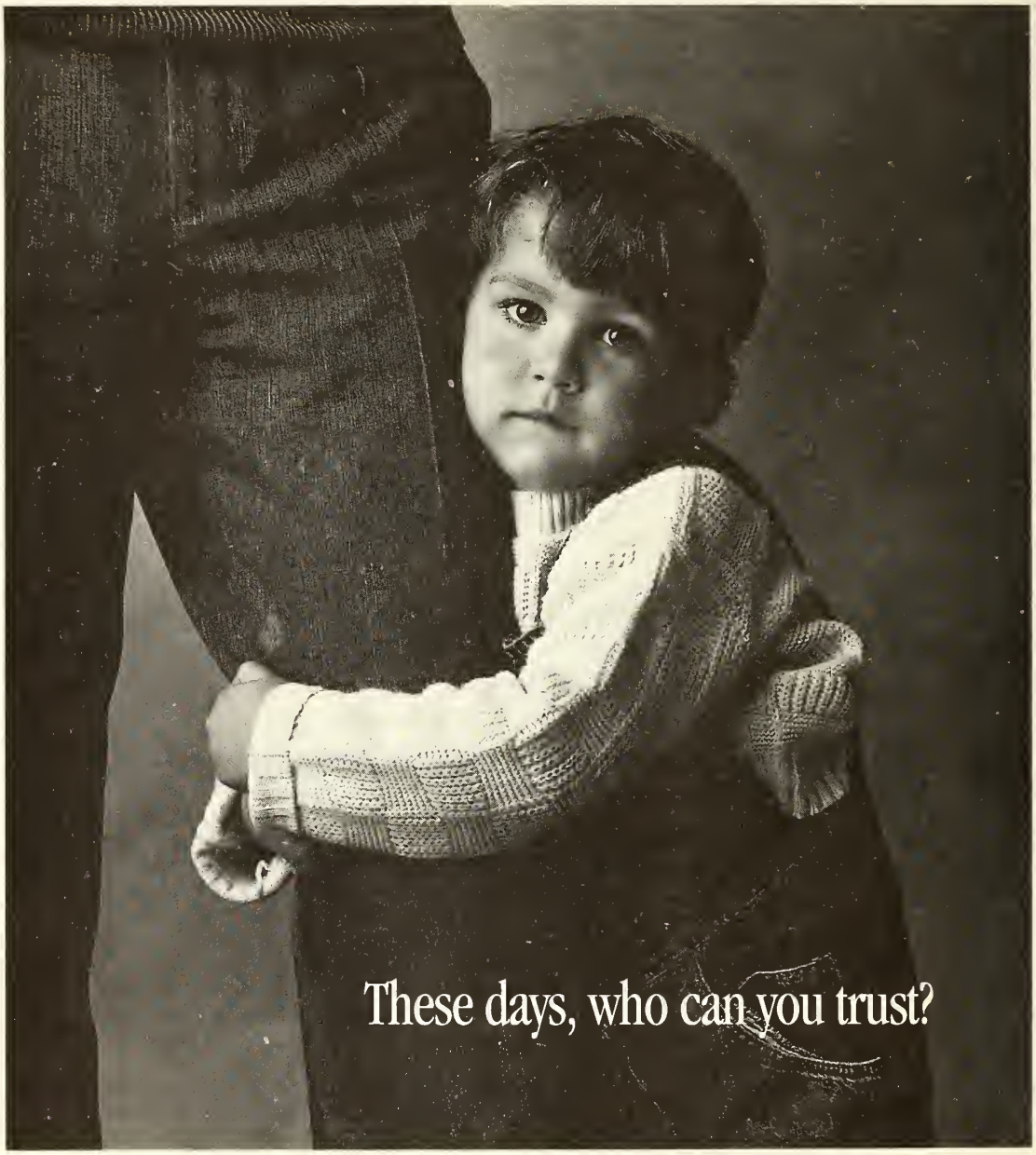

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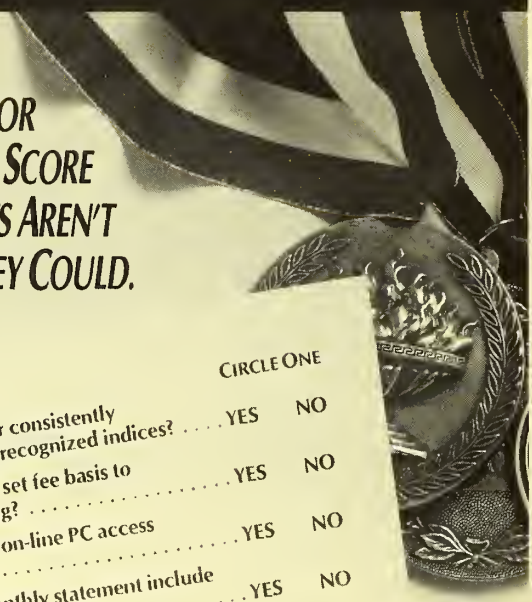

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